NO. 80-759

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., ROY and JOSIE FISHER, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE NINTH CIRCUIT

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Tucson, Arizona 85701
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Attorney for Petitioners
Alberto Sanchez, et al.

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require mailed notice of a proposed settlement in a school desegregation case where the school district maintains a complete list of all class members and their last known addresses?

2. Does the Fourteenth Amendment or Rule 23(e) require the notice of settlement in a school desegregation case to state that the proposed compromise provides for immediate closure of minority schools?

3. Does the Fourteenth Amendment or Rule 23(e) require the notice of settlement in a school desegregation case to state that the proposed compromise provides for dismissal with prejudice and without trial all claims alleging a denial of equal educational opportunities?

4. May class counsel simultaneously negotiate attorney's fees and a resolution of all substantive issues remaining in a school desegregation case?

5. In the event that counsel for the parties negotiate a school desegregation plan as one part of a single compromise settling all issues in the litigation, does the Fourteenth Amendment, Rule 23(e), Federal Rules of Civil Procedure, or the Manual for Complex Litigation, section 1.46, prohibit the District Court from conclusively approving the remedial plan without notice to the class, and subsequently conduct a settlement hearing at which objections to the remedial plan are not allowed?

PARTIES TO THE PROCEEDINGS

Petitioners herein:

Plaintiffs and Objectors/Appellants below:

ALBERTO SANCHEZ, NADINE SANCHEZ, BETTY SANCHEZ, GEORGE SANCHEZ, ERNEST SANCHEZ, JOHN SANCHEZ, JULIA O FLOREZ, BILLIE GUTIERREZ, THERESA MEDINA, BETTY M. GRANILLO, CAROL CRUZ-POPKIN, BARNEY PAUL POPKIN, CARMEN P. URRUTIA, MANUEL ALVARADO, CAROLYN HACKWORTH, GLORIA HAGLER, JOHNNY RANDOLPH-KELLY, THELMA B. MANRIQUEZ, ADOLFO A. SUAREZ, NAT WASHINGTON, II, RALPH O. GOMEZ, JUAN BRITO, MARCIA ALMEDA, EMILIA TALAMANTEZ, ELLEN LEE, ESPERANZA SILVA, ANTONETTE ROMO, RONALD Q. HUERTA, AND LUPE MONTANO

Respondents herein:

Plaintiffs/Appellees below:

MARIA MENDOZA, THERESA TRUJILLO, ALBERT TRUJILLO AND DAVID TRUJILLO; ROY and JOSIE FISHER, next of kin of ELIZABETH FISHER, BOYD and ELIZABETH LEWIS, next of kin of ELIZABETH ELLEN, WARREN, and JEFF LEWIS; LLOYD D. and VIRGINIA HALL, next of kin of KENNETH and LLOYD D. HALL; and GEORGE and JOYCE BROWN HUTTON, next of kin of MONDRE HUTTON; all on behalf of any persons similarly situated

Respondent herein:

Plaintiff-Intervenor/Appellee below:

UNITED STATES OF AMERICA

Respondents herein:

Defendants/Appellees below:

TUCSON SCHOOL DISTRICT NUMBER 1; THE BOARD OF EDUCATION, TUCSON SCHOOL DISTRICT NUMBER 1; LEBA WINE, SOLENG TOM, MITCHELL VAVICH, HELEN HAFFLEY, and KATIE DUSENBERRY, individually and as members, Board of Education, Tucson School District Number 1; THOMAS LEE, individually and as Superintendent of Tucson School District Number 1; and ANITA LOHR, individually and as Pima County School Superintendent

Respondents herein:

Defendants-Intervenors/Appellees below:

SIDNEY L. SUTTON, SALLY J. SUTTON, and SIDNEY L. SUTTON and SALLY J. SUTTON as Parents, Natural Guardians and next friend of SEAN SUTTON; JOHN R. CENTENO, MARY KATHERINE CENTENO and JOHN R. CENTENO and MARY KATHERINE CENTENO as Parents, Natural Guardians and next friend of SANDRA KATHERINE CENTENO and JAMES LEE CENTENO; LIBRADA G. RUIZ and LIBRADA G. RUIZ as Parent, Natural Guardian and next friend of ANDRES L. RUIZ; SIDNEY TAIZE and SIDNEY TAIZE as Parent, Natural Guardian and next friend of JONATHAN TAIZE, LISA TAIZE and JOSHUA TAIZE

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iv
Table of Authorities	v
Opinions Below	ix
Jurisdicion	ix
Statutes Involved	x
Statement of the Case	1
Reasons for Granting Writ	
1. Notice by Publication Denied the Class Due Process of Law.	16
2. Notice Omitting Reference to School Closures Denied the Class Due Process of Law	26
3. Notice Omitting Reference to Dismissal of the Quality Education Counts Denied the Class Due Process	30
4. Counsel may not be Allowed to Negotiate Class Interests and Attorneys' Fees Simultaneously	32

TABLE OF CONTENTS (Cont'd)

	PAGE
5. Seriatim Approval of a Remedial Desegregation Plan Negotiated as Part of a Class Action Settlement is Improper	43
Conclusion	54
Appendix (Under Separate Cover)	

TABLE OF AUTHORITIES CITATIONS

CASES:	PAGE
Armstrong v. Board of Directors, Etc., 616 F.2d 305 (7th Cir. 1980)	20,24, 54,55
Armstrong v. Manzo, 380 U.S. 454 (1965)	32
Brown v. Board of Education, 347 U.S. 483 (1954)	38
Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); 479 F.2d 1005 (2nd Cir. 1971), vacated 417 U.S. 156 (1974)	18, 19, 25
Grunin v. International House of Pancakes, Inc., 513 F.2d 114 (8th Cir. 1975)	25
Hansberry v. Lee, 311 U.S. 32 (1940)	40
In Re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979)	33, 39
In Re Gypsum Antitrust Cases, 565 F.2d 1123 (9th Cir. 1977), cert. denied 444 U.S. 870	24
Marshall v. Holiday Magic, 550 F.2d 1173 (9th Cir. 1977)	24, 44

TABLE OF AUTHORITIES
CITATIONS (Cont).

CASES:	PAGE
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978)	28, 30, 33
Miliken v. Bradley, 418 U.S. 717 (1974)	31
Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306 (1950)	16, 17, 18, 19, 21, 22, 23, 24, 24, 28
New York v. N.Y., N.H. & H.R. Co., 344 U.S. 293 (1953)	18, 23
Oburn v. Shapp, 393 F. Supp. 561 (E.D. Pa. 1975) aff'd. on other grounds, 521 F.2d 142 (3rd Cir. 1975)	25
Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169 (1978)	33, 49, 51
Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977)	33
Schroeder v. New York, 371 U.S. 208 (1962)	18

TABLE OF AUTHORITIES CITATIONS (Cont).

CASES:	PAGE
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1972)	27, 38
United States v. Armour & Co., 402 U.S. 673 (1971)	27, 44
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975)	27, 44
United States v. Swift & Co., 286 U.S. 106 (1932)	27
Walker v. City of Hutchison, 352 U.S. 112 (1956)	18, 22
STATUTES:	
United States Constitution Fourteenth Amendment	3, 32
20 U.S.C. §1617	20
28 U.S.C. §1331(a)	1
28 U.S.C. §1334(3)	1
28 U.S.C. §1334(4)	1
40 U.S.C. §2000d	31, 35
Federal Rules of Civil Procedure	
Rule 23(b)(1)	1
Rule 23(b)(2)	1, 16
Rule 23(b)(3)	1
Rule 23(e)	9, 52

TABLE OF AUTHORITIES CITATIONS (Cont).

	PAGE
Federal Rules of Evidence	
Rule 408	39
Manual for Complex Litigation §1.46	53 ,55
MISCELLANEOUS	
Code of Professional Responsibility Canons 5 and 7	40
Levin, "Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorneys' Fees are Authorized", CCH, Clearinghouse Review, Vol. 14, No. 6, October, 1980	41

OPINIONS BELOW

The Findings of Fact and Conclusions of Law entered on June 5, 1978 by the District Court are unreported. The pertinent Orders of the District Court are also unreported, but contained in Petitioner's Appendix B through I, pages 61-124.

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 27, 1980, and is reported at 623 F.2d 1338.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1980, and the Petition for Rehearing was denied and the Suggestion for Rehearing en banc was rejected on August 11, 1980. (App. K P. 151); the jurisdiction of this Court is invoked under 62 Stat. 928, 28

U.S.C. 1254(1).

STATUTES INVOLVED

Amendment 14, Section 1, to the United States Constitution, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 718 of the Act of June 23, 1972, 86 Stat. 369, 20 U.S.C. §1617, provides:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision

of this title [20 USCS §§1601 et seq.] or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Federal Rules of Civil Procedure, Rule 23 et seq. See Appendix O , p. 180 through 184 for full text.

Section 601, of the Act of July 2, 1964, 78 Stat. 252, 42 U.S.C. §2000d provides:

§2000d. Nondiscrimination in federally assisted programs

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

activity receiving Federal financial assistance. (July 2, 1964, P.L. 88-352, Title VI, §601, 78 Stat. 252.)

Code of Professional Responsibility, Canons 5 and 7. See Appendix P p. 185 through 188 for full text.

STATEMENT OF THE CASE

In late 1974, Mexican-American plaintiffs filed an Amended Complaint in Federal District Court alleging that Tucson Unified School District No. 1 (hereafter referred to as "District") had: Count 1: Maintained a tri-ethnic segregated school system; Count 2: Engaged in discriminatory tracking; Count 3: Maintained inferior curricula and facilities for minorities; Count 4: Discriminated in the hot-lunch program; Count 5: Discriminated in special education programs; Count 6: Failed to properly take into account linguistic differences; and Count 7: Failed to employ bilingual notices.[1/] The action was certified as a class action in December of 1975.[2/]

1/ The District Court found jurisdiction pursuant to 28 U.S.C.§1331(a), §1343(3) and (4).

2/ The trial court certified the action under Rule 23(b)(1),(b)(2) and (b)(3).

Class members were given an opportunity to opt out and some 1,450 of the estimated 17,000 chose to do so. Individual notice of the pendency of the action was delivered to class members.[3/] In June, 1976, plaintiffs Mendoza, et al., moved to stay proceedings on Counts 2, 5 and 6 of their Amended Complaint. The District Court stayed and severed these Counts from further discovery and trial. A Stipulation and Order was filed dismissing Count 3 of plaintiffs' Mendoza's Amended Complaint without prejudice and dismissing with prejudice Counts 4 and 7. The class was not notified of the Stipulation or the Court's order.

The consolidated cases were tried from January 11 through January 21, 1977. The issue at trial was whether the District

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3/ During class notices were given to children for delivery to their parents.

was then maintaining a dual or segregated school system in violation of the Equal Protection Clause of the Fourteenth Amendment, Count 1 of plaintiffs' Mendoza's Amended Complaint. On June 5, 1978, the Court found that the District had not operated a dual Mexican-American/Anglo system, but that it had acted with segregative intent between 1951 through 1976, and that the effects of those actions remained at nine schools--Spring and Safford Junior High Schools and University Heights, Roosevelt, Manzo, Jefferson Park, Cragin, Tully and Brichta Elementary Schools.

On June 5, 1978, the Court also ordered the District to propose a plan to eliminate the vestiges of racial and ethnic discrimination which would be heard and, if possible, implemented by the beginning of the 1978-79 academic year. (App. B , P. 62).

On July 17, 1978, the District was ordered to file a desegregation plan by that same date. In its Order, the Court also set August 2, 1978 as the last day for the plaintiffs to file objections to the plan or present alternatives, and August 8, 1978, for hearing on all such submissions. The Order further required counsel to inform each class of the contents of the plan or plans and, to advise the Court of the extent to which class members agreed or objected to their provisions. (App. C , P.67). Formal notice to the class of the hearing was not required by the District Court.

Settlement negotiations began immediately after entry of the June 5 Order. On August 2, 1978, six days before the hearing on the desegregation plan, counsel for all parties informed the trial court that they had reached a final settlement, which included but was not limited to the

plan itself. A stipulation of settlement was filed and accepted in lieu of compliance with the July 17, 1978 Order requiring counsel to inform the Court of class members' objections to or agreement with the proposed desegregation plan. (App. J&N, P. 125 & 173).

On August 4, 1978, the Court ordered that a fairness hearing on the stipulation of settlement be held on August 24, 1978. (App. D , P. 73). No preliminary hearing was conducted to determine whether the stipulation of settlement fell within the range of reasonableness. The hearing on the desegregation plan, set before the parties had informed the trial court that they had reached a tentative settlement, was not vacated even though the remedial plan was part of the overall compromise.

During the course of settlement negotiations, it became clear that counsel for the Mexican-American class had agreed

to the closure of three inner-city minority schools in exchange for other concessions by the District.[4/] On July 27, 1978, petitioner Sanchez, who opposed the closures and was the only remaining named plaintiff with children in District 1 schools, requested substitution of counsel on behalf of himself and the class he represented. On August 3, 1978, the Court ordered substitution for Sanchez and his children only. The next day, Sanchez filed a motion to create a subclass comprised of Mexican-American parents and their children who resided in attendance areas served by the schools which would

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4/ "Once a decision was rendered concerning the liability of the District, settlement negotiations were commenced and eventually led to the point that closure of some minority schools became probable. At that point, a difference of opinion arose between plaintiff Sanchez and other named plaintiffs, and he sought and was allowed separate counsel for himself." App. F , P. 100 Order Denying Certification of A Subclass.

be closed pursuant to the settlement. Sanchez's motion was heard August 7, 1978. The Court conducted a hearing on the desegregation plan the following day. The District, with the approval of the plaintiffs, presented evidence in support of the desegregation plan, and requested that the District Court approve it as it appeared in the settlement. Counsel for all parties to the agreement informed the Court that pursuant to the stipulation of settlement, they would not object to the desegregation plan nor present alternatives, but requested leave to oppose the plan and present alternatives if the settlement proposed was not accepted by the Court. Petitioner Sanchez offered no evidence at the hearing except his own testimony. He made prior requests to the Court to continue the hearing on the desegregation plan in order that he might oppose it effectively and present

alternatives, but the requests were denied. Numerous class members, without benefit of counsel, spoke in opposition to the desegregation plan during the "public comment" portion of the hearing. No formal notice of this hearing was provided the class. On August 11, 1978, the trial court issued two Orders: The first approved the desegregation plan; the second denied Sanchez's motion for subclassification (App. E , P. 75 ; App. F P. 98).

In denying petitioner's motion for subclassification, the District Court observed that its membership was composed of persons who opposed closure. Since that precise issue had been conclusively determined against them, the Court deemed subclassification unnecessary as well as inappropriate. Additionally, the Court observed that since counsel only agreed to

the desegregation plan as part of an overall settlement, class members would have an opportunity to object to clousre at the settlement hearing.[5/]

Likewise, in its order approving the desegregation plan, the Court noted that it had been negotiated as part of the settlement:

> "All other named plaintiffs have entered into a proposed settlement with the defendants which resolves all issues raised in these consolidated cases. As part of the settlement, plaintiffs, other than Sanchez, have raised no objections to the plan offered by the defendants as to the

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5/ "Secondly, the other plaintiffs have only agreed to these closures as part of an overall settlement. Concessions of viable issues are necessarily made in settlements and Title 28 United States Code, Federal Rules of Civil Procedure 23(e) adequately provides for class members who object to certain concessions. There will be a hearing on the proposed settlement at which all class members will have an opportunity to be heard." App. F, P.101-P. 102, Order Denying Certification of a Subclass.

nine schools included within the Court's June 5, 1978 order." (App. E , P. 76-77).

On August 14, 1978, the Court approved a notice of settlement and the proposed method for disseminating it. (App. G , P.105). Although the stipulation of settlement provided for the dismissal of Counts 2 through 7 of the Amended Complaint in the Mendoza action, the notice did not state that those claims would be dismissed if the settlement were approved. Similarly, it failed to mention that several schools would be closed pursuant to the compromise. Rather, it stated that the schools targeted for closure would be "operated" according to certain options set forth in the desegregation plan. (App. L , P.158). These options dictated the immediate closure of inner-city minority schools. Petitioner Sanchez objected to the content of the

notice and also to the method dissemination approved by the Court.

Petitioner argued that the notice should have been mailed to the class. The District had a complete list of all class members and their addresses; it had previously mailed information to them on a regular basis. At the hearing on the settlement, the District's witness, Assistant Superintendent Starr, testified ". . . that we have a master list of all parents' addresses and we certainly, if we are going to contact them, would put something in the mail. . .". The Court denied the motion and directed that the notice be published in the local press. (App. G , P. 107). Publication began on August 22, 1978, eight days before the hearing on the settlement. During the first three days of publication, the notice appeared in the classified section

under the heading "Legal Notices" in small, unbordered print. Petitioner Sanchez objected to the placement of the notice in the classified section and on the remaining four days prior to the hearing, it appeared in a separate section of the local newspapers in bold-face type surrounded by a black border.

On August 7, 1978, petitioner Sanchez served a request for production upon the District and counsel for the Mexican-American class. Since a response was not forthcoming, petitioner filed a formal motion nine days later. In doing so, he specifically requested discovery on the school closure provisions of the stipulation of settlement. On August 22, 1978, the District Court denied any discovery on closure reasoning that the issue was moot because the remedial plan had been approved in the Order of August 11. (App. H, P. 111). Responses to such discovery

as the trial court allowed were not received by petitioners until August 29, 1978, the day before the fairness hearing.

On August 30, 1978, notice of designation and appearance of counsel for named objectors was filed by petitioner's attorney together with objections to the proposed settlement. The objections asserted that closure of three minority schools would place an undue burden of desegregation on minority children; that the closures would promote and/or maintain segregated residential patterns and schools; that the distribution and content of the settlement notice was defective; and that the inclusion of attorney's fees in settlement negotiations was improper. The hearing on the settlement proceeded as scheduled on August 30, 1978. The trial court, however, would not permit inquiry into or presentation of evidence on the desegregation plan. It also refused to

permit any inquiry into the role played by attorneys' fees during the settlement negotiations.

Counsel for the Mexican-American class presented one witness in support of the proposed settlement. Her name was Olma Riggs and she testified that she had no place of residence, but lived in her Ford Pinto station wagon. Her testimony related to only one aspect of the settlement, which was a reading program for thirty students of one year's duration. The remaining witnesses were called by the District and counsel for the Fisher class. They testified in support of settlement provisions pertinent to Black children, i.e., paragraphs 10, 11, 12, 13, 14 and 15 of the stipulation of settlement. Most of these witnesses testified that programs, similar to those designed for the Black students, should have been developed for children in the Mendoza class. Moreover,

several of these witnesses also testified that they would have prepared comparable programs for Mexican-American students if they had been asked to do so.

At the close of the second day of hearings, the Court approved the compromise as submitted. On September 28, 1978, appellants filed their notice of appeal contesting the trial court's Orders of August 11, 1978, denying petitioner's motion for subclassification and approving the desegregation plan, and from its Order of August 31, 1978, approving the settlement. On June 27, 1980, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's Orders and on August 11, 1980, it denied petitioner's motion for rehearing and rejected a suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. Notice by Publication Denied the Class Due Process of Law.

The sole attempt to notify all class members of the settlement and the attendant hearing proceeded by publication in the local newspapers. Despite its disapproval of published notice, the Ninth Circuit cited Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306 (1950) in holding that the procedure satisfied due process. It reasoned that settlement of an action certified under Rule 23(b)(2) provides for a "structural injunction" affecting all class members equally. Methods of notification suffice if they prompt a segment of the class to attend the final hearing and express common objections to the agreement.

The analysis is squarely at odds with Mullane and its progeny. Since the individual interests at stake in that case were "identical with [those] of a class" "any

[successful] objections [to the accounting] would [have] inure[d] to the benefit of all." Mullane, 339 U.S. at 319. That fact did not determine the process due at the final stage of the litigation: Notice must always serve the elementary and fundamental purpose of ensuring that every person legally affected by a proceeding receives an opportunity to be heard. Mullane, 339 U.S. at 314.

> "This right has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Mullane, 339 U.S. at 314.

Notice has not been accorded such importance for the convenience of the trial court in order that it may entertain "common" objections to a proposed settlement. Rather, it is vital to the protection of each individual whose rights may be compromised or denied in subsequent proceedings. Id.

For that reason, this Court has repeatedly and unequivocally condemned notice by publication. Eisen v. Carlisle & Jacquelin (Eisen III), 417 U.S. 156, 174-177 (1974) (relying principally on Mullane); Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchison, 352 U.S. 112 (1956); New York v. N.Y., N.H. & H.R. Co., 344 U.S. 293 (1953); Mullane, 339 U.S. at 315-18. "Chance alone" determines whether "even a local resident" will actually see published notice and learn that his interests are subject to final adjudication. Mullane, 339 U.S. at 315. Individual notice must, therefore, be mailed to each person whose identity and whereabouts are readily ascertainable. The Court of Appeals has now adopted a standard diametrically opposed to that principle:

> "A party's capability to provide individual notice does not make such notice mandatory

> when notice by publication will suffice." (App. A, p. 50).

Since Mullane, this Court has consistently held that published notice is insufficient in precisely those cases where the responsible party can provide individual notification without undue difficulty. Eisen III, 417 U.S. at 174-75.

Here, as in Eisen III, the defendants below maintained a complete list of all class members and their addresses. Prior to the settlement hearing, the District had routinely publicized significant events by mailing individual notice to each parent whose children attended its schools. That fact alone demonstrates the ease with which the same procedure could have been followed at the settlement stage; it negates any claim of undue burden, inconvenience or expense. Mullane, 339 U.S. at 319.

Furthermore, assuming arguendo that the nature of the relief at issue deter-

mines the notice due the class, the settlement in this action did not merely provide for a "structural injunction". The final compromise dismissed all claims alleging that the Mendoza class had been denied equal educational opportunities with prejudice and without a trial on the merits. Adequate notice of the settlement was, therefore, especially imperative. In reviewing settlement proceedings in a school desegregation case decided two months before the opinion below was announced, the Seventh Circuit required individual notice to all persons in the plaintiff class. Armstrong v. Board of School Directors, Etc., 616 F.2d 305, 313 (7th Cir. 1980). Given the importance of the issue in future civil rights litigation, the current division of authority among the Circuits ought to be resolved immediately.

The Court of Appeals also relied on

certain attempts to supplement notice by publication. The record demonstrates that they amounted to less than a "mere feint". Mullane, 339 U.S. at 315. Copies of the settlement notice were left at local radio and television stations, but the content was never broadcast prior to the hearing itself. Several hundred copies were available at certain schools and each of seven businesses in minority neighborhoods. Since the schools were closed for summer vacation, class members received them only if they attended a meeting at these places. Similarly, notices delivered to a few businesses did not reach class members unless they visited them, were identified as such and provided copies by third parties who had no legal duty to do so.

Apart from the fact that far fewer notices were available than the 17,000 required for individual distribution, the technique did not satisfy the requirements

of Mullane. Receipt of notice may not be conditioned on adventitious events, nor may the burden of notification fall upon affected individuals. Walker, 371 U.S. at 212-214. Mullane and its successors draw the clearest possible distinction between those interested persons who can and cannot be identified as well as located. Due process demands the "reasonably certain" method of mailed notice in any case where their identity and whereabouts are easily determined. Mullane, 339 U.S. at 318-19.

Finally, the Ninth Circuit cited extensive publicity surrounding the litigation as further justification for published notice, while ignoring yet another defect in the methods used here. The publicity was not aimed at individual class members, nor was it intended to apprise them of specific settlement terms, the procedure for lodging objections, documents pertinent to the compromise or

the time and place of the final hearing. See Mullane, 339 U.S. at 315. At most, it furnished some actual notice that a settlement had been reached, but informal knowledge of a proceeding is no substitute for legal notice properly disseminated to interested parties. N.Y., N.H. & N.R. Co., 344 U.S. at 297.

On August 14, 1978, the District Court ordered publication to commence as soon thereafter as possible. The text first appeared in fine print beneath the column headed "legal notices" on August 22, 1978, eight days before the settlement hearing itself. That format was only changed after counsel for the petitioners filed a formal objection two days later. Mullane condemned published notice in the precise form which the parties selected and the trial court subsequently approved. 339 U.S. at 315.

Furthermore, notice "must afford a

reasonable time for those interested to make their appearance." Citations omitted. Id., 339 U.S. at 314. Here, five days of publication outside the classified section of local newspapers preceded a settlement hearing in a school desegregation case commenced four years earlier. In the time alloted, a reasonable understanding of the compromise, preparation of testimony and submission of proper objections was impossible.

It is, indeed, no "accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers." Id., 339 U.S. at 315. Since that decision, notice of settlement in federal class actions has consistently proceeded by individual mailings. See, e.g., Armstrong, 616 F.2d at 310; In Re Gypsum Antitrust Cases, 565 F.2d

1123 (9th Cir. 1977) Marshall v. Holiday Magic, 550 F.2d 1173 (9th Cir. 1977); Grunin v. International House of Pancakes, Inc., 513 F.2d 114 (8th Cir. 1975); Oburn v. Shapp, 393 F. Supp. 561 (E.D. Pa. 1975), aff'd. on other grounds, 521 F.2d 142 (3rd Cir. 1975). In Eisen III, this Court reiterated Mullane's teaching--adequate notice of the proceedings in a class action remains an essential requisite of due process. Mailed notice passes constitutional muster; publication "[has] long been recognized as poor substitute for actual notice. . .its justification is difficult at best." Eisen III, 417 U.S. at 213.

The Court has not passed on the precise question which this case raises. While Eisen III dealt solely with procedural safeguards unique to an action certified under Rule 23(b)(3), the present issue is fundamental to the proper manage-

ment of all class actions at the settlement stage. In resolving it, the Ninth Circuit has disregarded the reasoning and holdings of this Court, which should now grant the petition for a writ of certiorari.

2. Notice Omitting Reference to School Closures Denied the Class Due Process of Law.

The notice of settlement indicated that various minority schools would be "operated" in accordance with "options" set forth in the desegregation "plan". If, the Ninth Circuit observed, the plan were part of the settlement, the notice might well have been "fatally defective" in its failure to state that three of the schools would be immediately closed once the district court approved the compromise. The settlement document recited that the parties stipulated and agreed to the desegregation plan. The record, including the pleadings, the statements of counsel and

the orders of the trial court, conclusively demonstrates that the plan was negotiated as one element of an overall compromise. See section 5 , infra. The decisions of this Court, which the Ninth Circuit has steadfastly ignored, foreclose any other interpretation of the agreement. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975); United States v. Armour & Co., 402 U.S. 673 (1971); United States v. Swift & Co., 286 U.S. 106 (1932).

In the context of desegregation, this Court has emphasized the significance of a decision to close schools:

> "The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex . . . Over the long run, the consequences of the choices will be far reaching. . . The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. Swann v. Charlotte-Meckleburg Board of Education,

402 U.S.1, 20-21 (1971).

Notice of a final adjudication "must be of such nature as to convey the required information. . .". Mullane, 339 U.S. at 314. Where a settlement in a desegregation case provides for the immediate closure of inner-city schools, the accompanying notice must state that fact in the clearest possible language. Absent such critical information class members cannot intelligently choose whether "to appear or default, acquesce [in] or contest" the parties' agreement. Mullane, 339 U.S. at 314. It is, however, "the purpose of notice under the Due Process Clause to apprise the affected individual of, and permit adequate preparation for an impending hearing." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14-15 (1978). Emphasis supplied.

In the instant case, class members could not learn of impending school clo-

sures even if they obtained and read the section of the settlement document setting forth the desegregation plan. Like the notice, it stated that schools would be operated according to certain "options" without specifying their purpose or content. In that respect, the notice of settlement did not merely fail to provide essential information; it affirmatively misled the class. Its clear reference to future "operation" of Spring, Roosevelt and University Heights schools could not possibly have communicated the essential fact that the settlement provided for immediate closure, not continued use, of those facilities.

The requirements of due process, as they apply to the settlement notice in civil rights litigation, are not mere formalities. Class members cannot determine that interests of basic importance may be lost, bargained away or denied unless they

are adequately informed of the proceeding at hand and its subject matter. Although it has not decided the question now presented, this Court has repeatedly stressed that the right to a meaningful hearing depends on the substantive adequacy of prior notice. Craft, 436 U.S. at 14-15.

The Ninth Circuit itself recognized that omissions in this settlement notice would have been fatal had the compromise included the desegregation plan. That fundamentally erroneous disposition of the constitutional issue can only be rectified by this Court.

3. Notice Omitting Reference to Dismissal of the Quality Education Courts Denied the Class Due Process.

As the Court of Appeals observed, the notice of settlement omitted any reference to the single most important provision of the compromise: The agreement stipulated that Counts 2,3,4,5,6 and 7 of the Amended

Complaint in the Mendoza litigation would be dismissed with prejudice. Although they alleged that Mexican-American children were subjected to discriminatory tracking, unequal curricula and other practices violating Title VI of the 1964 Civil Rights Act, none was ever tried. Once approved by the district court, a settlement dismissing them with prejudice constituted a final adjudication binding on all persons then in the class.

In addition to alleged de jure segregation, the Title VI counts were at the center of the Mendoza action. See Miliken v. Bradley, 418 U.S. 717 (1974) (the continuing discriminatory effects of de jure segregation frequently require affirmative educational efforts beyond a mere reassignment of faculty and students). Although the Ninth Circuit recognized the "potential" significance of its failure to mention school closures, that court never con-

sidered whether the settlement notice accorded due process by omitting any reference to the dismissals with prejudice. The Fourteenth Amendment will not countenance such a complete failure to notify interested parties that they are on the verge of finally losing an opportunity to vindicate their civil rights. Armstrong v. Manzo, 380 U.S. 545, 550 (1965). By reaffirming that principle, this Court will ensure that due process is afforded during any settlement of future class actions.

4. Counsel may not be Allowed to Negotiate Class Interests and Attorney's Fees Simultaneously.

Fully aware of the dangers inherent in the practice, the Ninth Circuit disapproved combined negotiations on fees and class interests. Even if a settlement fund is not at stake, the procedure allows counsel to enhance their personal gain at the expense of the plaintiff class. Con-

versely, it affords defendants a negotiating advantage which is all too easily exploited. Neither the trial court nor class members can reconstruct the bargaining process and independently determine that the introduction of attorney's fees did not improperly influence the final result. For these reasons, other Circuits have condemned the negotiating methods used in this case. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1216 N.71; Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977); see also Armstrong, 616 F.2d at 313, citing In Re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1120 (7th Cir. 1979), cert. denied, 444 U.S. 870 100 S.Ct. 146 (1979).

Here, correspondence exchanged among counsel at the settlement stage illustrates the risks inherent in the practice. In a letter dated July 13, 1978, the District outlined a proposed desegregation plan and

offered counsel for the plaintiffs $400,000 in fees and costs. The reply of Fisher's attorneys, dated July 19, 1978 set forth objections to the plan, noting that it required school closures which imposed the burden of desegregation on minority children alone. The authors suggested that closures ought to be accompanied by new school construction at an appropriate site. Fisher's lawyers also advanced a counter-offer of $550,000 in fees and costs.

At the end of the month, they entered into a settlement mandating school closures and payment of $500,000 to plaintiffs' counsel. The compromise did not, however, require new construction in former attendance areas. Class members affected by them had uniformly opposed the closures which, as the trial judge specifically found, were <u>not</u> necessary to achieve desegregation.

In short, the negotiations produced a

compromise committing the District to increased compensation for opposing counsel without incurring the far greater expense of maintaining present schools or building new facilities.

The Court of Appeals properly concluded that a settlement resulting from combined negotaitions on fees and class interests must be "closely scrutinized". Assuming for the moment that such post hoc review will suffice to protect the class, it never occurred in the instant case.

The Ninth Circuit's requirement presupposes a heightened judicial concern for the adequacy of benefits received by the class weighed against the amount paid counsel for the time and effort expended in obtaining them. Here, plaintiffs' counsel negotiated a half million dollars in fees, while agreeing to dismiss all Title VI claims with prejudice. Although the settlement included provisions on cur-

ricula, testing and discipline, they were developed by Fisher's experts for the benefit of black children. The experts testified that similar efforts should have been undertaken on behalf of the Mexican-American class, but noted that they were never approached by Mendoza's counsel during the settlement negotiations. The compromise called for desegregation of three schools in addition to those specified in the June 5th Order because Fisher's lawyers demanded that concession. Counsel for the Mendoza class did obtain a pilot reading program based on the Spalding Method. It was open to thirty students on a voluntary basis; there were 17,000 children in the class at the time of settlement.

A gross disparity in the benefits received by the largest class emerges even without "close scrutiny" of the parties' compromise. The Ninth Circuit, however, simply did not attempt the very analysis

which it deemed essential whenever fees and substantive interests are negotiated simultaneously. The district court refused to entertain any evidence demonstrating the influence of fee demands on the overall settlement. Judicial review cannot operate to prevent abuses inherent in the technique unless this Court insists on genuine scrutiny of the final result.

Although it disapproved combined negotiations in the abstract, the Court of Appeals sanctioned the procedure sub judice. It observed that Government counsel participated in the negotiations and approved the compromise. Since they were present to protect class interests and could not recover attorney's fees, their involvement weighed heavily in favor of the settlement. The record simply does not reveal the extent or nature of their participation. The United States has not denied that fees were negotiated together with the rights of the

class, nor has it disapproved the procedure or sought to prevent counsel's gain at the expense of their clients. The mere presence of Government attorneys, who do not represent the class, is no guarantee against an improper compromise. Indeed, it cannot suffice without a specific showing that they actually protected class interests during negotiations which remain prima facie suspect.

The Court of Appeals also cited the trial judge's familiarity with the litigation as additional protection against an unethical compromise. In a school desegregation case, the remedial stage, however concluded, often exceeds the trial in difficulty as well as complexity. Swann, 402 U.S. at 11-14; Brown v. Board of Education, 347 U.S. 483, 495 (1954). The issues and evidence necessary to a proper resolution are not automatically determined at trial. Id. Where four years of litigation are con-

cluded in less than three months with a minimum of discovery or adversary presentation, the trial court cannot be intimately familiar with the special problems posed by a remedy for de jure segregation.

More importantly, the Appellate Court's reasoning begs the question. Improprieties in the course of settlement negotiations cannot be identified without an inquiry aimed specifically at exposing them. In Re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1133, 1141 (7th Cir. 1979). In the instant case, the trial court refused to entertain evidence bearing on the course of negotiations or the role played by attorney's fees in shaping the final compromise. Its reliance on Rule 408 of the Federal Rules of Evidence was clearly erroneous. Id. at 1124 n. 20. Rather than seeking to enlighten itself on the dispositive issue or to protect the class against a tainted compromise,

the district court thwarted any inquiry on point.

Finally, the Ninth Circuit permitted combined negotiations on the theory that a statutory procedure existed whereby class counsel could have petitioned the trial court for a fee award. See 20 U.S.C. §1617. Where a separate statutory proceeding is available, any conceivable justification for simultaneously negotiating counsel's compensation and class interests disappears. By resorting to a fee petition, counsel would have avoided the very impropriety which the Court of Appeals recognized so clearly. The existence of an ethical and adequate alternative cannot seriously be invoked to justify methods prohibited by Cannons 5 and 7 of the Code of Professional Responsibility.

Adequate representation by counsel remains the touchstone of due process in any class action. Hansberry v. Lee, 311 U.S.

32 (1940). Adequate representation surely requires counsel to maintain undivided loyalty to the class. Where he proceeds to negotiate on their behalf, while simultaneously bargaining for maximum personal compensation, a fundamental conflict of interest arises. Its influence, both subtle and obvious, is not eradicated merely because plaintiffs' lawyers assure the trial court that they have proceeded in good faith.

The question now presented has profound implications for the proper management and conduct of class actions at the settlement stage. While joining the Third, Fifth and Seventh Circuits in disapproving combined negotiations, the Ninth Circut has proceeded to allow them for reasons which do not withstand close scrutiny. Definitive guidance from this Court on an issue of such growing importance is urgently required. Levin, "Practical, Ethical and

Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized", CCH Clearinghouse Review, Vol. 14, No. 6, October 1980.

5. Seriatim Approval of a Remedial Desegregation Plan Negotiated as Part of a Class Action Settlement is Improper.

The Ninth Circuit concluded that the desegregation plan was not a settlement and that there was no evidence in the record demonstrating that it was negoitated as part of the compromise. Since class members were not notified of the plan hearing, nor given an opportunity to present objections to the remedial plan at the settlement hearing, determination of this issue is critical. In resolving it, the Ninth Circuit has totally disregarded the record.

It is not open to question or interpretation in this case. First, the settlement itself stated that the parties agreed to, inter alia, the provisions of the desegregation plan as set forth in that document (App.J , P.127). It is black letter law that a court may not go beyond the four corners of the settlement document

when construing its provisions. United States v. Armour & Company, 402 U.S. 673 (1971). An exception arises only where ambiguities in the agreement force the court to consider the circumstances in which the compromise was reached. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). Aside from the fact that this settlement is absolutely unambiguous on its face, the circumstances surrounding its negotiation and approval demonstrate that the plan was nothing but a part of the settlement. In reaching a contrary result, the Ninth Circuit has totally disregarded this Court's decisions in Armour and ITT.

Final notice in a class action must contain a fair recital of the subject matter and the terms of the proposed settlement. Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (1977). The notice of settlement in this case described the

desegregation plan as part of the compromise and invited class members to attend the fairness hearing if they had any objections to it[6/] such references were proper only if the desegregation plan was an element of the compromise.

Counsel for both classes and the Government repeatedly informed the trial court that they had agreed to the desegregation plan only as part of the settlement and would either object to the compromise or present alternatives if the settlement were rejected:

> MR. MOORE: (attorney for the Government). . ."Your Honor, in light of the proposed settlement, the Government would reserve its right to cross examine the defendants with respect to the nine schools that the court found to be de jure segregated."

6/ As pointed out, infra, p. 51 the District Court then refused to allow any inquiry into the desegregation plan at the settlement hearing.

MR. BALLER: (counsel for Mexican-American class) "Your Honor, at this stage, ordinarily, we would have a considerable amount of examination, but since, as the Court is aware, there is a proposed settlement between the parties, and if that settlement is approved, it would not be necessary for us to examine on the proposed District's [desegregation] plan. For that reason I would like at this time to reserve the right to examine on some of the options in the event the proposed settlement is rejected by the Court."

MR. ZAVALA: "I, in the course of entering settlement negotiations with the District and Mr. SALTER and the Government, was well aware of the general feeling in this community against school closures. . .and the problem that I had with their position is simply that they are focusing on one particular aspect of the entire settlement. . ."

"We felt, Your Honor, and I think the Court knows this, that in putting together the overall settlement proposal, . . our position essentially on those proposals (school closures) is that in

> the context of the overall settlement, . . . these make sense."

These comments were made in open Court at the hearing on petitioners' motion for subclassification and at the hearing on the desegregation plan. Obviously, the trial court was fully aware of the role the desegregation plan played in the overall settlement.

The orders of the District Court are conclusive on the point. In every order addressing the issue, the Court recognized that the remedial plan was agreed to by class counsel only as part of the settlement:

> Order Approving Desegregation Plan, August 11, 1978:
>
> "Various plans have been offered by the defendants for the upcoming school year and their preferences have been indicated. Although all named plaintiffs were given the opportunity to object to the defendants' plans and to offer alternative plans of their own,

only Alberto Sanchez has done so.

All other named plaintiffs have entered into a proposed settlement with the defendants which resolve all issues raised in these consolidated cases. As part of the settlement, plaintiffs, other than Sanchez, have raised no objections to the plans offered by the defendants." (App. E p. 76-77).

Order Denying Certification of a Subclass, August 11, 1978:

". . . the other plaintiffs have only agreed to these closures as part of an overall settlement. Concessions of viable issues are necessarily made in settlement. . . there will be a hearing on the proposed settlement at which all class members will have an opportunity to be heard." (App. F p.101).

Order Approving Settlement, August 31, 1978:

"Counsel entered into a proposed settlement subject to class hearings and court approval. The proposed settlement included approval by plaintiffs of a desegregation plan . . .

The Court found the desegregation plan approved by the

parties to be fair, equitable . . .". (App. I, P. 114-15).

Furthermore, a review of the correspondence exchanged among counsel prior to the settlement leaves no doubt whatsoever that the plan was negotiated as a centerpiece of the agreement. Lawyers for the District consistently demanded that plaintiffs' attorneys agree to the remedial plan as the quid pro quo for concessions on remaining issues. In the course of negotiations, class counsel responded by insisting upon and obtaining certain changes in the remedial "plan", which merely became one more subject of the parties' bargaining. (App. Q-U, p. 189-240).

Although the Ninth Circuit characterized the District Court's approval of the desegregation plan as its "independent judgment", it necessarily rejected the reasoning of Pettway v. American Cast Iron

Pipe Co., 576 F.2d 1157 (5th Cir. 1978), on which it purported to rely:

> "We perceive a significant distinction between an after-the-fact conclusion that a court's judgment is essentially satisfactory and, all things considered, does not justify an appeal, and a before-the-fact consent to the precise terms of defendants' proposed decree." 576 F.2d at 1172.

It is beyond dispute that the desegregation plan was presented to the trial court for its approval at the August 8 and 9 hearing. A settlement had already been reached in the case and, as the Ninth Circuit observed, the agreement provided that there would be "no further attacks on the desegregation plan. . .". (App. A , P. 10-11). Counsel for the classes and the Government then urged the Court to approve the desegregation plan as part of the settlement. Mr. Moore, counsel for the Government, stated:

> "We would hope again that the plans that we've come up with or the plans that we've agreed upon would be acceptable to the Court." (Made in open court, August 9, 1978).

In the unmistakable language of an order approving a settlement, the trial court deemed the plan "fair, equitable and curative". Pettway, 576 F.2d at 1147-75 n. 15.

Recognizing the absolute clarity of the record on this point, the Ninth Circuit reasoned that even if the desegregation plan were negotiated as part of an overall compromise, the District Court was still free to assess it separately, and approve it before the settlement hearing itself. (App. A , P.39,n.11). Although class members were not notified of the hearing on the plan, nor given an opportunity to challenge it at the hearing on the remainder of the settlement, such independent assessment and approval by the trial court was proper even without those

procedural safeguards.

It must be emphasized that class members opposing the desegregation plan were unrepresented at the hearing on its terms and conditions. Their counsel urged the Court to approve the plan as part of the settlement while acknowledging that class members affected by it were opposed to the provisions on school closures. The Ninth Circuit held, however, that the hearing on the desegregation plan was governed not by Rule 23(e) of the Federal Rules of Civil Procedure, but by the law controlling school desegregation remedies. (App. A , P.22). Hence, if a settlement in any school desegregation case includes a remedial plan, it may be considered and finally approved before the remaining provisions of the compromise are even reviewed by the Court.

The Manual for Complex Litigation expressly disapproves that precise technique.

Manual, Section 1.46. It violates the most basic principle governing approval of a class action settlement: The compromise must either stand or fall as a whole. Its components are inextricably linked during the negotiating process itself and may never be evaluated as though they were separate agreements at which the parties would have arrived without conceding other interests of the class. Id. As the sequence of events in this case amply illustrates, seriatim approval of settlement terms may easily proceed without prior notice to the class or a meaningful opportunity to evaluate critical provisions, prepare objections or present testimony at a fairness hearing. Separate, independent consideration of isolated provisions in a settlement prevents the trial court or class members from evaluating the compromise as a whole. Settlements are not negotiated element by element. Every benefit

received depends on some concession by class counsel. Here, the settlement which included the remedial plan also dismissed all pending Title VI claims with prejudice prior to trial, foreclosed the plaintiffs' right to appeal the June 5th Order, and awarded their counsel $500,000 in fees as well as costs. Whatever the merit of the plan, it was achieved at high cost to the Mendoza class.

The overall balance of such gains and losses determines whether the settlement is fair and within the range of reasonableness. That fundamental principle applies regardless of the nature of the issues involved in the litigation. If it is a product of the bargaining process, a remedial desegregation plan must be considered in light of the entire compromise. It must be evaluated together with all other provisions of the settlement at a single fairness hearing. Armstrong v. Board of

School Directors, supra; Manual on Complex Litigation, 1.46. The Ninth Circuit's disposition of the present issue is wholly at odds with the reasoning and holdings of the only other Circuit decision on point.

The opinion below sanctions an unprecedented approach to the approval of class action settlements. Apparently, the Ninth Circuit has concluded that procedures required in all other such litigation need not be followed where a desegregation case is settled. As Armstrong emphasized, the interests at stake in a desegregation proceeding are unusually important to the community as well as the litigants. Settlement procedures must be designed to insure full scrutiny by both the trial court and the class. Rather than requiring these essential safeguards, the Ninth Circuit has upheld techniques which encourage summary approval of

individual settlement provisions and minimal attention to the remainder. This Court should not allow such casual handling of the most important business before the federal judiciary.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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NO. 80-759

Supreme Court, U.S.
FILED
NOV 10 1980
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al.,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. L, et al.; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., ROY and JOSIE FISHER, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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TABLE OF CONTENTS

APPENDIX		PAGE
A.	Opinion of the United States Court of Appeals for the Ninth Circuit, 623 F.2d 1338 (1980)	1
B.	Order of the District Court, June 5, 1978, to propose a desegregation plan	61
C.	Order of the District Court, July 17, 1978 setting date for hearing on the desegregation plan	65
D.	Order of the District Court, August 4, 1978 setting date for hearing on settlement	72
E.	Order of the District Court, August 11, 1978, approving desegregation plan	75
F.	Order of the District Court, August 11, 1978 denying Motion for Subclassification	98
G.	Order of the District Court, August 14, 1978, approving Notice of Settlement	105
H.	Order of the District Court, August 22, 1978 Denying Request for Discovery	110
I.	Order of the District Court, August 31, 1978 Approving Settlement	113

TABLE OF CONTENTS - APPENDIX (Cont'd)

		PAGE
J.	Stipulation of Settlement	125
K.	Order of U.S. Court of Appeals for the Ninth Circuit Denying Motion for Rehearing, filed August 11, 1980	151
L.	Notice of Proposed Settlement	153
M.	Report of All Defendants other than Anita Lohr	165
N.	Joint Motion for Entry of Settlement Order	173
O.	Rule 23, Federal Rules of Civil Procedure	180
P.	Code of Professional Responsibility, Canons 5 and 7	185
Q.	July 7, 1978 letter to counsel for District	189
R.	July 12, 1978 letter to counsel for District	193
S.	July 13, 1978 letter to Plaintiffs from District counsel	195
T.	July 19, 1978 letter to counsel for District	210
U.	July 25, 1978 letter to Plaintiffs from District counsel	219

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3352

MARIA MENDOZA, ETC., ET AL.,

Plaintiffs-Appellees,

and

ALBERTO SANCHEZ, NADINE SANCHEZ, BETTY SANCHEZ, GEORGE SANCHEZ, ERNEST SANCHEZ AND JOYN SANCHEZ,

Plaintiffs-Appellants,

and

JULIA O. FLORES, BILLIE GUTIERREZ, THERESA MEDINA, BETTY M. GRANILLO, CAROL CRUZ-POPKIN, BARNEY PAUL POPKIN, CARMEN P. URRUTIA, MANUEL ALVARADO, CAROLYN HACKWORTH, GLORIA HAGLER, JOHNNY RANDOLPH-KELLY, THELMA B. MANRIQUEZ, ADOLFO A. SUAREZ, NAT WASHINGTON, II, RALPH O. GOMEZ, JUAN BRITO, MARCIA ALMEDA, EMILIA TALAMANTEZ, ELLEN LEE, ESPERANZA SILVA, ANTONETTE ROMO, RONALD Q. HUERTA AND LUPE MONTANO,

Plaintiffs-Objectors-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-
Appellee,

v.

TUCSON UNIFIED SCHOOL DISTRICT
NO. 1, ET AL.,

Defendants-Appellees.

OPINION

Appeal from the United States
District Court for the
District of Arizona

Before: CHOY and SNEED, Circuit Judges,
and EAST,* District Judge

Opinion of the United States
Court of Appeals for the Ninth Circuit
Filed June 27, 1980;
623 F.2d 1338

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

EAST, District Judge

The plaintiff-objector-appellant Alberto Sanchez, appearing individually and on behalf of his above-named minors, appeals the District Court's orders entered on August 11, 1978, which approved a submitted plan of desegregation, and August 31, 1978, which approved the settlement arrangement for desegregation of the Tucson School District No. 1. He also appeals the District Court's order of August 11, 1978, which denied the certification of a subclass and various other discovery and post-August 1, 1978 orders of the District Court. We affirm each of the orders appealed from.

In this class action school desegregation appeal, certain members of the minority class, including Sanchez, were dissatisfied with part of the remedy negotiated by attorneys for the class, the United States, and the school officials.

Sanchez was allowed to retain separate counsel and participate, although with a minimal amount of preparation time, in hearings on the School District's desegregation plan and the class action settlement. Sanchez also raises issues concerning discovery, notice, and negotiation of attorney's fees.

I. FACTS

In May of 1974, a school desegregation action was commenced against the Tucson Unified School District No. 1 by Black elementary and junior high school students (Fisher plaintiffs). That case is now on appeal in the consolidated case, No. 79-3378. Several months later, a separate action was filed on behalf of the District's Mexican-American elementary, junior high, and high school students (Mendoza plaintiffs), here on appeal. In late 1975, the Fisher and Mendoza plaintiffs were certified as class representatives for

these Black and Mexican-American classes, respectively. These two causes were consolidated in the District Court for hearing and disposition.

Sidney L. Sutton, et al., a group of white parents opposed to busing, entered as intervenor-defendants in the Fisher action in March, 1975.[1/] In December, 1976, the United States was permitted to intervene as a plaintiff in both actions.

1/ Sutton is an intervenor in the Fisher case only, District Court No. 74-90, and appeals a later order in that case in consolidated appeal No. 79-3378, Fisher v. Tucson Unified School District No. 1, ___ F.2d ___ (9th Cir. 1980), decided today. However, Sutton has no standing to participate in the present appeal because he was not a party to the Mendoza action, District Court No. 74-204, or this appeal. Alberto Sanchez, appellant here, is a party only to the Mendoza case, and his appeal is properly understood as an appeal only of the Mendoza case. Thus, Sutton's attempt to raise additional substantive objections to the August 31st settlement order by a brief filed in this appeal does not place those issues properly before this Court.

The Mendoza amended complaint consisted of seven counts, alleging (1) maintenance of a tri-ethnic segregated school system; (2) discriminatory tracking; (3) inferior curricula and facilities for minorities; (4) discrimination in the hot-lunch program; (5) discrimination in special education programs; (6) failure to take into account linguistic differences; and (7) lack of bilingual notices. Prior to trial, counts 2, 5 and 6 were stayed and severed based upon HEW's approval of the District's compliance plan to remedy these problems; and counts 3, 4, and 7 were dismissed pursuant to stipulation by class counsel.

After substantial discovery, a consolidated trial of the Fisher and Mendoza actions was held in January, 1977. On June 5, 1978, the District Court issued its joint decision, finding that the School District had failed to dismantle its former

dual school system for Blacks and non-Blacks, and had continued since 1954 to discriminate against Black elementary and junior high school students. The Court found no such dual school system had existed with respect to Mexican-American students, nor did any continuing system-wide practice of intentional discrimination occur. The Court concluded that nine schools suffered current effects of the past intentionally segregative acts of the School District, and ordered the District to prepare a desegregation plan with respect to these nine schools.

Post-trial motions were filed by Fisher and Mendoza plaintiffs, joined by the United States as an intervenor, to amend the findings and conclusions, and a hearing was held on June 28, 1978. Before a ruling on these motions, plaintiffs and the School District informed the Court that they were in the process of discussing a

mutually acceptable plan for desegregation of the nine schools, as well as resolution of the other pending issues. Although the Court withheld submission on these motions, it nonetheless ordered the District to submit its proposed plan for desegregation by July 17, 1978. The order further instructed the District to consult with its residents, and the plaintiffs' class members, in order to minimize objections to the plan. Accordingly, the District held a number of hearings and meetings, both for the affected parents and for the District's residents at large. At these meetings, the District presented desegregation options and solicited questions and comments. This process culminated with the District timely

filing its plan for the nine schools on July 17, 1978.[2/] The District Court scheduled a hearing on the plan for August 8, 1978, requiring that written objections be submitted by August 4.

On August 4, 1978, the attorneys reported to the District Court that their discussions had been fruitful: a settlement proposal on all remaining issues in the lawsuits was ready for the Court's consideration. The District Court scheduled a settlement hearing for August 24, 1978, and ordered a proposed form of notice be prepared. It did not disturb

---

2/ The District actually submitted several options, indicating the plan it preferred. The preferred plan "called for alteration of numerous student attendance zones, the closing of three old and small inner-city schools and altered transportation patterns for several hundred Anglo, Black and Mexican-American elementary and junior high school students." Brief of Appellee Tucson Unified School District No. 1, at 9 (footnote omitted.)

the upcoming August 8th hearing on the desegregation plan.

The stipulation of settlement adopted the District's nine-school desegregation plan, and included provisions for immediate integration of three additional schools. It required the District in cooperation with parents to examine future assignment policies at several other elementary and junior high schools, and to eliminate discrimination in faculty assignments, employee training, and policies on testing and discipline. Also included were provisions for program improvements, regular District progress reports, oversight, and procedural details.

With respect to the lawsuit, the settlement provided for dismissal of all remaining counts (numbers 2-7) in the Mendoza complaint, and the parties agreed that there would be no further attacks on the District Court's June 5th order, nor on the desegre-

gation plan or the settlement. The settlement also provided for $500,000 in attorney's fees for class counsel. The settlement was concurred in by attorneys for the District, the Fisher class, the Mendoza class, and the United States Department of Justice.

Meanwhile Sanchez took exception to part of the proposed desegregation plan. Specifically he objected to a provision which called for the closure of three of the nine affected schools, believing that it unfairly burdened portions of the Mexican-American class. Sanchez was also dissatisfied with class counsel's acquiescence in the closure of the three schools, and on July 27, 1978, he requested a substitution of counsel. Substitution was ordered on the following August 3.

On August 4, 1978, Sanchez filed a motion to create a subclass comprised of Mexican-American parents and their children

residing in the attendance areas of schools sought to be closed by the District. Argument was heard on this motion on August 7. Also on August 7, Sanchez moved to continue the August 24th settlement hearing, and for additional time to present objections and alternatives to the District's desegregation plan. The settlement hearing was postponed to the following August 30, over the objections of the other parties, but no relief was granted on his request for additional time to object to the plan. That same day, August 7, Sanchez filed and served his first request for production of documents.

Hearings on the desegregation plan were held on August 8 and 9. The School District presented testimony in support of the plan. Due to the settlement, neither the class representatives nor the Government objected or chose to conduct cross-examination, but sought to reserve such

opportunity should the settlement be disapproved by the Court. The District's witnesses were cross-examined by Sanchez, and he was given the opportunity to present evidence. Both Sanchez and Sutton, appellant in No. 79-3378, lodged their objections to the District's plan and presented alternatives. The Court then heard comments on the plan from members of the public.

Two days later, on August 11, the Court issued two orders. First, it approved the District's desegregation plans, finding that they were in compliance with the June 5th order--that they sufficiently remedied the violations found to exist in the nine schools. Second, the Court denied Sanchez's motion for certification of a subclass. It noted that the subclass's reason for existing, objection to the school closures, was mooted by the order approving the desegregation plans. And in-

sofar as its objection reached the settlement itself, the settlement hearing under Rule 23(e) would protect objecting class members.

On August 14, 1978, the District Court approved the form of settlement notice to class members. Printed in both English and Spanish, it was published in Tucson's two daily newspapers.[3/] In addition, copies of the notice were distributed to community groups, merchants and churches in the class members' neighborhoods. The notice contained a brief history of the litigation, a description of the Court's June 5, 1978 decision, a general summary of settlement terms, and a notice of the settlement hear-

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3/ The notice ran for seven days in one of the papers and for six in the other. On the first three days, in both papers, the announcement appeared in the fine print typical of legal notices. On the remaining days, it was published in standard type and highlighted with a black border.

ing.

On August 16, Sanchez filed a motion for discovery in the form of production of documents and interrogatories. The motion was granted on August 22, except as to the issue of school closure, which had been determined in the August 11th order. Responses to the discovery were received on August 25 and August 29.

Just prior to the settlement hearing, the Fisher and Mendoza plaintiffs filed memoranda in support of the settlement, and Sanchez filed papers in opposition. The settlement hearing was conducted on August 30 and 31. The Court limited it at the outset to the question of whether the settlement was "fair, just, and adequate," and declined to entertain testimony on issues which had already been litigated and decided (e.g., school closures). Evidence was taken from the parties at the hearing, and individual class members were permitted

to present testimony. At the close of the hearing on August 31, the Court approved the stipulated settlement.

Sanchez has appealed the order of August 11, the final order entered on August 31 approving the settlement, and several other post-August 1 rulings. Sanchez here questions the Court's refusal to certify a subclass, the form, content and alleged lack of notice, the Court's rulings on discovery and scheduling of the proceedings, and the propriety of negotiating attorney's fees along with substantive issues in the settlement of this litigation. Our jurisdiction to review these issues rests on 28 U.S.C. § 1291.

II. NATURE OF THE ISSUES.

The issues in this case center around its status as a class action school desegregation suit. Both its procedural context as a class action and its substantive context as a school desegregation suit shape

our review and the resolution of the questions presented.

A. Class Action.

Although this case is substantively a school desegregation suit, the issues raised by Sanchez concern the procedural law of class actions. Sanchez does not object to the findings and conclusions in the Court's June 5th segregation decision, nor does he substantively challenge the Court's subsequent approval of the District's desegregation plan or approval of the settlement itself. Rather, Sanchez suggests that procedural infirmities surrounded the consideration and ratification of the plan and the settlement.

Representative suits carry with them an accepted structural risk that conflicts may arise between groups of class members. It may be unavoidable that some class members will always be happier with a given result than others, but potential injustice

arises as the distribution of benefits and burdens in a class remedy becomes increasingly unequal. Although maximizing the overall gain is a valid pursuit in resolving a class action, a small minority of the class members may not be asked to bear an unduly disproportional share of the accompanying burdens. This possibility of inadequate accommodation of the interests of some or many of the class members, particularly absentee members, is a principal structural danger in class suits. See In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.), cert. denied, 100 S. Ct. 146 (1979); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1213-16 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

Recognizing these inherent risks in class suits, the Rules of Civil Procedure attempt to counter them by imposing procedural requirements on the conduct of such

actions. Fed. R. Civ. P. 23. See Pettway at 1214. In addition, courts have affirmed the special responsibility placed upon the trial judge to protect the rights of absentee class members, as well as those who are named plaintiffs. E.g., Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971). Overall fairness is the touchstone for evaluating the conduct and resolution of class actions, and the onus for this evaluation is vested in the trial court.

Class actions vary widely in their circumstances, and the procedural protections and judicial responsibilities are necessarily only generally defined. Broad discretion is granted to the trial judge, enabling him or her to respond fluidly to the varying needs of particular cases.

Therefore, although certain factors must be considered and certain procedures complied with, much of the judicial oversight of class actions is in the form of the sound discretion of the District Court. See Pettway, 576 F.2d at 1214; In re General Motors, 594 F.2d at 1133. This will dictate our review of the District Court's actions.

Sanchez separately participated in this suit as one whose interests at the remedy stage of the litigation conflicted with those of other class representatives[4/] and members of the class. As was apparent at the hearings on the desegregation plan and the settlement, at least some other class members share Sanchez's views. Most of Sanchez's complaints in this Court arise from the way the District Court ac-

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4/ Alberto Sanchez was one of the original named plaintiffs in the Mendoza action.

commodated Sanchez's participation as an objector in the remedy and settlement proceedings.

Thus, in examining the accommodation accorded Sanchez, we are for the most part reviewing the District Court's choices of how the required procedures were to be implemented. These are decisions within the general responsibility for judicial control and oversight of class actions, and accordingly are within the Court's broad discretion. Therefore, beyond assuring ourselves that Sanchez's constitutional due process rights were not violated, our standard of review for these choices is whether they reflect an abuse of discretion by the District Court, in light of the circumstances and posture of the case. This posture, i.e., the stage of the proceedings and the questions being addressed, will in part be determined by substantive school desegregation law.

B. School Desegregation Context

Many of Sanchez's complaints charging the District Court with failing to properly accommodate his objections to the school closures are grounded on a fundamental misunderstanding of the purpose of the school closure question following the August 11th order approving the desegregation plan. Sanchez's complaints that the school closure issue was not properly considered in the procedures surrounding the settlement hearing assume the continuing vitality of this issue after the August 11th order, and what remained to be considered in the settlement proceedings, are determined by the law governing school desegregation remedies in the federal courts.

When a federal court finds that a public school system operates in a manner infringing upon some students' federal constitutional rights, the Court is empowered to prescribe a suitable remedy. Keyes v.

School District No. 1, Denver, Colo., 413 U.S. 189 (1973); Wright v. Council of City of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). In the first instance, however, the Court must give the local school officials an opportunity to devise changes sufficient to bring the schools' operations within the constitutional standards. Swann at 16. See Brown v. Board of Education, 349 U.S. 294 (1955). If the school officials present a plan which will correct the violations found, and it does not infringe upon other rights in the process, the District Court must approve that remedy even if the Court does not believe it was the most desirable plan which could

have been selected.[5/] See Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977); Milliken v. Bradley, 418 U.S. 717 (1974).

In the present case, the District Court in its June 5th decision found continuing constitutional violations at nine Tucson schools, and it ordered the School District to prepare a remedial plan. On July 17, 1978, following public hearings, the District filed with the Court several plans to correct the violations, desig-

5/ This does not, of course, in any way, diminish the District Court's obligation to carefully scrutinize a school district's proposal, to be sure that it does in fact satisfactorily correct the adjudged constitutional informities. Too often have remedies been proposed which merely perpetuate the segregative status quo. See, e.g., Green v. County School Board, 391 U.S. 430 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968). The Court's responsibility to review and reject such thinly veiled forms of continued discrimination is at the very heart of its judicial function. But when the school district has submitted a plan which survives this searching inquiry, it must be accepted.

nating the options it preferred. The Court held hearings on this plan August 8 and 9. On August 11, the Court issued an order finding the options acceptable remedies for implementation in September, 1978. This plan included involuntary busing of some students and the closing of three of the nine designated schools.

The hearing on August 8 and 9 was specifically and solely directed to the question of whether the District's desegregation plan remedied the constitutional violations found in the June 5th order, and whether it did so in a constitutional manner. The District Court's understanding of its role was consistent with the limited remedial jurisdiction of the federal courts in school desegregation cases. As the Court noted in its August 11th order:

> "The remedy which this Court has authority to order must work, it must work now, and it must not inflict additional burden on plaintiffs and the classes they

> represent, nor inflict further racial or ethnic segregation or discrimination on such plaintiffs. This Court's jurisdiction or power does not extend any further than that. Concerning all other interests, parents and others must look to their elected officials.
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> "At present, the Court must rule only on the issue of whether the defendants' proposed plans for the upcoming school year sufficiently remedy the violations heretofore found to exist with respect to nine schools."

The District Court went on to observe that the closing of the three schools was not required by its June 5th order, but that those closures were compatible with it. The Court's careful examination of the school closures determined that they would not place an undue burden on minority students. Finally, the District Court concluded that the proposed plans were "acceptable remedies for the constitutional violations heretofore found."

We believe the District Court properly perceived its role in reviewing the desegre-

gation plan. The August 11th approval of the District's desegregation plan was an independent judgment of the District Court conclusively deciding the permissibility of the plan, including the school closures, for the 1978-79 school year. With this understanding of the status of the school closure issue as of August 11, we can proceed to examine the specific issues raised by Sanchez.

III. SPECIFIC PROCEDURAL ISSUES

Sanchez argues that approvals of the desegregation plan and the class action settlement were done in violation of the objectors' procedural rights. We address his several assignments of error below.

A. Timing

Sanchez first objects to the short period of time available to him to prepare for the plan hearing and the settlement hearing.

1. The Plan Hearing

The timing of the plan hearing is one of the more troubling issues raised by Sanchez. He correctly points out that he was allowed very little time to prepare his objections to the plan. The desegregation plan was submitted on July 17, Sanchez requested substitution of counsel on July 27, and the hearing was held August 8 and 9. In addition to objecting to the plan, Sanchez was simultaneously advancing a subclass motion and preparing discovery requests.

We have no doubt that Sanchez received sufficient opportunity to be heard to satisfy constitutional due process requirements. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The closer question is whether the District Court abused its discretion in its scheduling of the remedy hearings, given its awareness that there were objections

from within the class.

The fact that the action before the Court is a class suit imposes special responsibilities upon the trial judge. As noted above, representative suits carry with them inherent dangers of conflict and compromise of absentee interests. Accordingly, a Court overseeing a class suit must constantly be sensitive to conflicts within the class. See Note, Developments in the Law -- Class Actions, 89 Har. L. Rev. 1318, 1490 (1976) (judicial awareness of differences within a class as a protection of absentee interests). The Court must be well informed of the views of objectors, and serve as a guardian of absentee interests. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976); Greenfield v. Villager Industries, Inc. 483 F.2d 824, 832 (3rd Cir. 1973). Cf. Norman v. McKee, 431 F.2d at 774 (context of Rule 23(e)).

However, the desegregation plan was not a settlement, and was not bound by the more formal Rule 23(e) requirements. Fed. R. Civ. P. 23(e). With respect to the proposed plan, the District Court's responsibility was to assure itself that it had before it all relevant arguments, objections, and considerations concerning the plan. The extent, timing and even existence of the plan hearing rested largely within the discretion of the trial court.

Review of a trial court's discretion must always be done in light of the circumstances of the case. See Anderson v. Air West, Inc., 542 F.2d 522, 524 (9th Cir. 1976). In addition, we are not to substitute our ideas of fairness for those of the trial court in the absence of evidence that it acted arbitrarily, Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 771 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976), and such evidence must constitute

a "clear showing" of abuse of discretion, Flinn v. FMC Corp., 528 F.2d 1169, 1172 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976). In re Gypsum Antitrust Cases, 565 F.2d 1123, 1128 (9th Cir. 1977). Unless we find that the exercise of discretion was arbitrary and constituted plain error under the circumstances, we will not reverse. See Bowles v. Quon, 154 F.2d 72, 73 (9th Cir. 1946).

It is significant that the settlement and objections have come at the remedy stage of this litigation, and not during pretrial proceedings as do many class action settlements. Here, the District Court was particularly well informed about the action, having been intimately associated with it for over four years. This association included a full trial on the merits, familiarity with a voluminous amount of evidence, and a lengthy and detailed written decision. The Court was

able to assess the relative merits and significance of a given argument or objection, and determine the amount of detail needed in the presentations. A further element properly in the Court's consideration was the desire to implement whatever plan was approved at the start of the next school year in September.

The District Court could also assess Sanchez's opportunity to prepare his objections to the plan. First, Sanchez had been involved in the case from its commencement as one of the original named plaintiffs in the Mendoza action, placing him in a different position than that of a passive, insulated class member. Second, Sanchez requested substitution of counsel on July 27, meaning that he and his attorney had at the minimum nearly two weeks in which to prepare their objections to the plan. Third, it was clear from the District Court's order establishing the August

8th hearing that it was not a settlement hearing, but rather focused only on the acceptability of the desegregation plan. As discussed above, this was limited to an examination of the adequacy of the District's plan in acceptably correcting the constitutional violations found in the Court's June 5th decision. There was nothing misleading in the Court's order, and Sanchez should have been aware of the narrow focus of the August 8th hearing. Given these considerations, the Court could properly decide that Sanchez could prepare a presentation for the hearing sufficient to inform the Court of potential constitutional problems the plan might contain for those who, due to a conflict of interests within the class, were not adequately represented by class counsel on the issue of school closure.

Thus, in light of these circumstances, we cannot say the District Court abused its

discretion in not postponing the plan hearing.

2. The Settlement Hearing.

Sanchez also contends that he was not afforded adequate time nor sufficient discovery to prepare for the August 30th settlement hearing. Initially we conclude that Sanchez's opportunity to be heard was not so limited or so nominal that it violated due process requirements. See Mullane, supra.

Our second inquiry is whether the District Court abused its discretion in not continuing the settlement hearing further into the future.[6/] Fed. R. Civ. P. 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court . . ." It further

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6/ The Court granted one request by Sanchez for a continuance, postpoing the hearing date from August 24 to August 30.

requires that notice of the settlement[7] be sent to class members, and though not mandatory, generally a hearing on the settlement is held.[8] Patterson v. Stovall, 528 F.2d 108, 114 (7th Cir. 1976). See Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974). Notice and hearing are provided to assure that there are no unrepresented interests which are unfairly treated by the settlement. Absent class members are afforded an opportunity to come forward and make the Court aware of any undisclosed inadequacies. See Norman v. McKee, 431 F.2d at 774; Pettway, 576 F.2d at 1214-16. Particularly at the settlement stage, the Court must be keenly aware of

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7/ Sanchez also contests the form of content of the notice given in this case. See section III-C, infra.

8/ In school desegregation cases, however, hearings on proposed remedies are almost universally held, and it may well be an abuse of discretion not to conduct one.

its role as a "fiduciary [serving] as a guardian of the rights of absent class members." Grunin, 513 F.2d at 123.

The form which the Rule 23(e) procedural protections take is clearly left to the discretion of the trial court. Fed. R. Civ. P. 23(e). The Court must have before it sufficient information to assure itself that there were not procedural defects in the reaching of the settlement, and that the substantive terms of the settlement are fair and reasonable. Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); Norman, 431 F.2d at 774; Grunin, 513 F.2d at 123. Although the Court must be particularly sensitive to any sacrifice of minority interests, there will generally have to be some compromise where, as here, the remedy sought is pervasive structural relief necessarily affecting all class members. The trial court must be able to determine if the balance struck is

is basically fair, looking to the benefits to be achieved by the class as a whole, as well as the distributive effects.

The question presented here is not whether the trial judge was correct in his substantive determination of fairness, but whether he abused his discretion in his scheduling of the settlement hearing. Because the purpose of a settlement hearing is to insure the opportunity for all relevant facts and objections to be placed before it to intelligently evaluate the settlement proposal. Detroit v. Grinnell Corp., 495 F.2d at 462-63; Newman v. Stein 464 F.2d 689, 692 (2d Cir.), cert. denied, 409 U.S. 1039 (1972). And in reviewing this question, we must accord great weight to the trial judge's views. He was close to the litigants and the case, was far more familiar with it than this Court, and in a superior position to perceive what needed to be known. Cf. Ace Heating & Plumbing

Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971).

Here, Sanchez had at the minimum nearly a month to prepare for the settlement hearing, and his discovery requests were granted[9/] (except as to the issue of school closure which had been rendered moot by the Court's August 11th order).[10/] Sanchez had been involved in the case from its inception, and there was a voluminous

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9/ Sanchez received his requested material on August 25 and 29. He could, however, have chosen to use more expedient discovery procedures, or requested accelerated returns for his requests.

10/ Sanchez suggests that denial of discovery on the issue of school closure was improper, and that there exist relevant and unsubmitted facts on this issue. However, as discussed above, the Court's August 11th order approving the desegregation plan properly affirmed its constitutionality and rendered further proceedings on the school closure issue moot. See section II-B, supra. We understand from Sanchez's brief that given this view of the Court's August 11th order, he concedes that the objectors would not be entitled to discovery on the school closure issue.

resource of material already available. As it was, the District Court postponed the settlement hearing for one week on Sanchez's motion over the settling counsel's objection. Further, Sanchez has not demonstrated to this Court any relevant facts or objections which were not placed before the District Court.[11/]

11/ Sanchez argues that the desegregation plan was a part of the settlement, and thus should have been open to attack at the August 30th settlement hearing. To support his position, he points to the fact that the class attorneys did not object to the plan at the August 8-9 hearing, and that the plan was identified in the settlement. First, the substance of the plan was reached two weeks before the stipulation of settlement, and there is no evidence that the plan itself was a product of settlement negotiation. Second, even if it were the result of settlement negotiations, this would not necessarily preclude the District Court from independently assessing whether the plan conformed to the June 5th order. Ordinarily, some sort of adversary proceedings would be an important part of the process leading to a District Court's independent judgment. Here, however, the trial court judge was thoroughly familiar with the case. Moreover, there was in fact adversary presentation at the plan

In light of these circumstances, we believe that the District Court had sufficient information before it from all viewpoints to evaluate the fairness of the settlement. Moreover, it appears that no significant objections were suppressed by the District Court's decision to deny any further continuances of the settlement hearing. We find no abuse of discretion

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hearing by Sanchez and others. Finally, as discussed in the text (see section II-B, supra), the Court ruled upon the question of the plan's constituionality in its August 11th order. Consequently, it cannot be maintained that the merits of the plan itself remained an open question at the settlement hearing.

in the scheduling of the settlement hearing.[12/]

12/ Sanchez relies heavily on Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979), in arguing that the presence of objectors to a settlement should have invoked more accommodation by the District Court. Such reliance is misplaced. In Pettway, there was a far more pervasive class rejection of a proposed settlement which led the Fifth Circuit panel to believe the trial court had abused its discretion in approving the Title VII class action settlement. There, each of the active class representatives objected to the settlement, the elected members of a workers' committee actively overseeing the litigation rejected it, and at least 70 percent of the class (and perhaps more) opposed the settlement. Id. at 1214 & n.70. While we do not suggest that the quantity of objectors will determine whether a settlement proposal should be rejected, that factor, among many other factual distinctions, renders Pettway a poor factual analogue to this case. We do, however, find our holding here to be consistent with the general standards of class action law discussed and applied in Pettway.

B. Request for Subclass Certification

Sanchez moved for certification of a subclass, with himself as a class representative, to include those class members who would be directly affected by the school closure provisions of the desegregation plan.[13/] The District Court denied this certification motion simultaneously with its approval of the plan, finding, inter alia, that there was no longer any need for a subclass formed to object to school closures because the issue was

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13/ The proposed subclass was described as follows:

> "[A]ll Mexican-American or Hispano-American students or students with Spanish Surnames with grades K through 8 in Tucson School District Number One, and the parents, guardians and/or next friends of those students, who now attend or will in the future attend a school subject to or proposed to be, immediately or in the future, closed by order of this Court or proposed settlement by the parties."

decided on the merits by the approval of the plan, and, furthermore, the subclass description was vague. We agree with the District Court that after the August 11th order, the need for the subclass disappeared.

Subclasses must meet the same requirements as a class. Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974). Just as the determination of class certification rests within the sound discretion of the trial court, James v. Ball, 613 F.2d 180, 186 (9th Cir. 1979); Montgomery v. Rumsfeld, 572 F.2d 250, 255 (9th Cir. 1978), so, too, does the determination of the need for a subclass. It is appropriate to invoke subclassification when there are or may be divergent views among class members and when the Court believes that subclasses would materially improve the presentation of all relevant considerations.

Sanchez's arguments that the District Court erred in denying his motion for subclass certification stem principally from his misunderstanding of the Court's August 11th order. As discussed in section II-B above, the August 11th order finally decided on the merits the question of whether the schools sought to be closed by the School District would in fact be closed. Thereafter, the role that the school closures were to play in the settlement hearing became second order: Their existence could be considered in terms of the overall fairness of the settlement, but the fact of the closures themselves were no longer open to objection. Thus, the substantive question of whether those three schools would or could be closed was not, contrary to Sanchez's argument, present at the settlement hearing.

The foreclosure of this issue from the settlement strikes at the heart of the sub-

classification motion. The need for the subclass was premised upon the desire to prevent the schools from being closed, a desire apparently shared by a significant number of parents whose children attended those schools. However, it is not at all clear where the proposed subclass stood on the overall fairness of the settlement, given as irrevocable the decision to close the schools under the District's plan. Nor is it clear that their views on this question differ from the interests of the class as a whole. Finally, it does not appear that the District Court was deprived of any material viewpoints, objections, or information for want of a subclass at the settlement hearing.

For the foregoing reasons, we find no abuse of discretion in the District Court's denial of Sanchez' subclass motion.

C. Notice

Sanchez objects to both the form and the content of the settlement notice.[14/] He contends that the failure to mail individual notice to class members was a violation of due process. He asserts the same complaint about the tardiness and form of the newspaper notice. With respect to content, Sanchez notes that the notice did not (1) advise that counts 2, 3, 5 and 6 of the Mexican-American complaint would be dismissed with prejudice; (2) name the specific schools to be closed under the approved desegregation plan; or (3) reveal

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14/ Sanchez also argues that notice was required before the August 8th and 9th hearings on the desegregation plan. He contends that because the plan ultimately became a part of the settlement proposal, the plan hearings became de facto settlement hearings, requiring all the commensurate procedural formalities, including notice. Because we reject this view of the August 8th and 9th hearings, see section II-B, supra, we also reject any claims that notice to the class was required prior thereto.

any formula for division of attorney's fees among the class attorneys. He claims that these omissions rendered the notice defective.

Rule 23(e)[15] requires that notice to the class be given of any proposed class action settlement.[16] Although the rule

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15/ Fed. R. Civ. P. 23(e) provides:

> "(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

16/ Appellees suggest that notice may not have been required here at all, inasmuch as the action had already gone to judgment on the merits. We disagree. In many 23(b)(2) class actions, and in school desegregation cases in particular, there are significant issues which remain after judgment which do not lend themselves to simple and straightforward resolution. The broad scope of potential injunctive relief and the variety of remedies available raise the possibility that interests may be compromised. The procedural protections attached to the initial action should also be considered applicable to the remedy phase in such circumstances, at least as a matter of proper class action administration.

accords a wide discretion to the District Court as to the form and content of the notice, due process requires its presence and constitutional adequacy. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172-77 (1974); Grunin, 513 F.2d at 121. To meet this standard, the notice given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 314. Further, in applying Rule 23(e), this Court has noted that it reasonably demands that notice be given "in a form and manner that does not systematically leave an identifiable group without notice." Mandujano, 541 F.2d at 835.

1. Form

The notice of settlement approved by the District Court was published 13 times in a seven day period in the two major

Tucson newspapers, [17] beginning eight days before the August 30th and 31st settlement hearing. The notice was printed in both English and Spanish, and copies were provided to the local broadcast media, and were distributed to numerous locations throughout the minority community which are frequented by large numbers of class members.[18] Further, the trial court observed in its notice order that there was a "great amount of local publicity concerning all prior orders and proceedings." All members of the class necessarily lived within Tucson School District No. 1, an area served by the newspapers carrying the notice, and were subject to all of the additional publicity generated by the suit.

17/ See note 3, supra.

18/ Copies of the notices were delivered to many local merchants, churches, community centers, etc.

We believe this form of notice was reasonably calculated to reach the members of the class. A party's capability to provide individual notice does not make such notice mandatory when notice by publication will suffice. In a class action seeking a structural injunction, notice is intended to encourage those with divergent views to come forth, helping the trial court to identify possible inadequacies in the settlement. In general, in such cases seeking a structural remedy, publication notice sufficiently accomplishes this major purpose. See Developments, supra, at 1566. Here, in particular, there was widespread actual notice of the settlement and the hearing as a result of the published notice and other sources, and a number of class members did in fact come forward to object. It being reasonably concluded that this form of notice would be effective, and with the subsequent

indications that it did in fact reach large numbers of the class, we find no abuse of discretion or violation of due process in the form of notice provided here.

2. Content

Nor do we find any infirmity in the content of the notice provided. Notice in a class suit may consist of a very general description of the proposed settlement. Grunin, 513 F.2d at 122. It "must present a fair recital of the subject matter and proposed terms." Holiday Magic, Inc., 550 F.2d at 1177. Here, the specific omissions which Sanchez notes are not fatal to the document.

The content of this notice provides a fair and general summary of the settlement. It first identified the members of the class to whom it was directed, briefly mentioned the background of the case, described the Court's June 5th desegregation order,

and identified the nine schools requiring desegregation. The notice then went on to describe the proposed settlement. It cited the options under which the nine schools would be operated; identified the additional three schools which would have assignment patterns altered; identified additional schools whose assignments would be studied; mentioned additional procedural points of the settlement; and disclosed that a $500,000 attorneys' fee (including costs) had been agreed upon and incorporated. The notice also informed the reader where a copy of the stipulation of settlement and the desegregation plan could be obtained, announced the time and place of the settlement hearing, and concluded by inviting any class member to file written objections or to appear and be heard by the Court.

Sanchez relies on In re General Motors Corp. Engine Interchange Litigation, 594

F.2d 1106, in arguing that the failure to disclose the division of the agreed-upon attorneys' fees rendered notice defective. We do not find this case factually analogous to General Motors. The General Motors case was procedurally complex--many class actions had been consolidated, the Attorneys General of most states were participating as well as private attorneys, and only a small committee conducted the settlement negotiations, perhaps without authority to do so. We do not believe that the same potential for abuse and undue influence existed here. Moreover, the total amount of fees to be paid here was disclosed, and only two sets of attorneys were to participate in its division. While disclosure as to apportionment of the negotiated attorneys' fees may have been desirable, we cannot say it was an abuse of discretion to approve the settlement notice without such a provision.

Sanchez further objects to the notice because it does not specify that three schools will be closed under the desegregation plan. The notice merely states that these schools "will be operated. . . in accordance with [certain options] of the plans submitted to the court on July 17, 1978." Again, this argument loses force when the school closure question is viewed in proper perspective. If the merits of school closure were subject to debate at the settlement hearings, this omission might well be fatal. However, because the school closures only assumed a subordiante role at this hearing, they could be described in the same general terms applicable to other portions of the settlement notice. The notice generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard. We find the content

of the settlement notice to be adequate.

D. Attorneys' Fees

Finally, Sanchez complains that the simultaneous negotiation of attorneys' fees and substantive issues in the settlement discussions was improper. He describes possible trade-offs between additional benefits to the class and attorneys' fees, and argues that these are improprieties which should weigh toward reversal.

Although we find the scenarios offered by Sanchez to be no more than suggestive of mere potential conflicts, we cannot endorse the procedure used here to reach agreement on attorneys' fees. Negotiation is necessarily a give and take process, and all active elements are weighted in the balance. We cannot indiscriminately assume, without more, that the amount of fees have no influence on the ultimate settlement obtained for the class

when, along with the substantive remedy issues, it is an active element of negotiation. See Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977). Nor do we believe that this potential conflict disappears simply because there is no fund or money damanges being negotiated. Financial consequences of injunctive relief are a significant consideration to the institution negotiating a remedy, and the potential conflict[19/] between class counsel

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19/ We do acknowledge, however, that danger of impropriety may not be as great here as when there is one fund from which both the class award and the attorneys' fees are to be apportioned. In such a case, where the defendant is indifferent as to the allocation, the conflict is more direct. These are appropriate circumstances for the District Court to take into account. See, text following note 18, infra. Cf. Schlensky v. Dorsey, 574 F.2d 131, 150 (3d Cir. 1978) (simultaneous negotaition permitted in shareholders' derivative suit because defendant had interest in maximizing class recovery).

and the members of the class remains.[20/]

Whether the existence of this potential conflict requires a trial court to reject a settlement proposal depends upon the circumstances of each case. The presence of simultaneously negotiated attorneys' fees should cause the court to examine with special scrutiny the benefits negoitated for the class. It would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place. But rejection of a settlement is not automatically required in such cases--there may be circumstances present which appear to neutralize the potential for impropriety.

20/ We do not make any findings that there were in fact improprieties in the negotiation of this settlement. However, "[t]he court does have the duty to see to it that the administration of justice has the appearance of propriety as well as being so in fact." Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977).

Such a judgment is appropriately within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation. Thus, while we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations, accord, Prandini, 557 F.2d at 1021, we do not believe rejection of a resulting settlement in every case is appropriate.

This case, while presenting the evil of simultaneously negotiated attorney fees, also contains such neutralizing elements. The United States Department of Justice has been an active participant in this case on the side of the plaintiff class since before the trial on the merits. It participated in the negotiations leading to settlement, and placed its imprimatur on the ultimate proposal. The participation of a government agency in such proceedings serves to protect the interests

of the class against possible improper dealings. Its concurrence in the approval of a settlement is properly an element for the Court to consider. Holiday Magic, Inc., 550 F.2d at 1178. See Developments, supra, at 1563. We believe this participation to be a significant factor in quieting the potential for unfair treatment of minority interests within the plaintiffs' class. While the Justice Department's involvement is not determinative of any issue, it weighs favorably in issues focusing on potential unfairness to absentee interests. Further, we believe it to be of some mitigating value that there was statutory authorization for an award of attorneys' fees to plaintiffs. See 20 U.S.C. § 3204 (formerly 20 U.S.C. § 1617). Again, while this is not determinative, and not a justification for class action parties to engage in simultaneous negotiation in the future, we believe it is a mitigating factor pro-

perly considered in this case. Under these circumstances, we do not believe that the trial judge abused his discretion in approving the settlement.

CONCLUSION

Sanchez has raised issues concerning the conduct of the class action proceedings in this school desegregation suit. Generally, we believe Sanchez has misunderstood the nature of the District Court's approval of the desegregation plan, as it related to the issues of school closures. Specifically, as discussed above, we find no due process violations or abuse of discretion in the trial court's decisions on timing, discovery, subclass certification, notice, or settlement approval in light of the attorneys' fees negotiations. All other contentions raised by Sanchez have been considered and found to be meritless. The District Court orders appealed from are affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	No. CIV 74-90-TUC-WCF No. CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: June 5, 1978

IT IS ORDERED that:

1. The attached Findings, Conclusions, Schedules and Exhibits are hereby adopted as the Court's Findings of Fact and Conclusions of Law in these consolidated actions, subject, however, to the provisions of Rule 52(b), Federal Rules of Civil Procedure.

2. Defendants shall propose a plan designed to eliminate any vestiges of racial and ethnic segregation or discrimination, based on race or ethnicity, which have been found by the Court.

3. Such plan shall be developed and submitted to the Court with all due speed so as to be subject to hearing and review and thereafter commence with the beginning of the 1978-79 academic year, if possible.

4. Defendants are hereby enjoined from any acts or policies which deprive any student of equal protection of the law whether by intentional segregation or

discrimination based on a student's race or ethnic grouping.

5. Defendants are hereby enjoined until further order of the Court, from undertaking the construction of new schools or of permanent additions at existing schools without the specific authorization of the Court.

6. Counsel shall file concise memoranda within ten (10) days of the date of the filing of this Order, setting forth the views of the parties as to a proper and expeditious manner in which to proceed hereafter in these cases.

7. Hereafter, and until further order of the Court, all acts and/or policies of the District which substantially affect the racial or ethnic balance in any school in the District and/or which are discriminatory because based on race or ethnicity of any students in the district schools, shall be subject to Court review in these cases.

8. The Court shall retain jurisdiction over all aspects of these cases until such time as any and all effects of any and all discriminatory and/or segregative acts or policies of the District have been erased or until such time as the cases and/or the issues raised therein have otherwise been disposed of according to law.

9. Count Eight of the amended complaint in CIV 74-204-TUC-WCF is dismissed as to all defendants; the action is dismissed as to all defendants sued in their individual capacities. There is no just cause for delay. The Clerk shall forthwith enter judgment accordingly as to Count Eight and as to the defendants in their individual capacities.

DATED this 5th day of June, 1978.

s/William C. Frey
William C. Frey
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: July 19, 1978

W.J. Furstenau, Clerk
United States District Court
for the District of Arizona

By s/s
Deputy Clerk

IT IS ORDERED that:

On or before Monday, July 17, 1978, at 5:00 P.M., the defendants shall file a proposed plan or plans designed to eliminate any vestiges of racial and ethnic segregation or discrimination based on race or ethnicity which have been found by the Court. If alternatives are presented, the defendants shall indicate an order of preference. The defendants shall, without delay, take reasonable steps to inform the residents of the District of the contents of the proposed plan or plans and of any action by the School Board for the formation or creation of a citizens advisory group or for allowing other citizen participation and comment.

Counsel for plaintiffs shall, without delay, take all reasonable steps to assist in informing the members of the respective classes of the contents of the defendants' proposed plan or plans, and shall make provision to hear objections and suggestions by members of the classes they represent. Before 5:00 P.M., Wednesday, August 2, 1978, plaintiffs shall file any objections to defendants' proposed plan or plans together with any proposed additions, amendments or alternative plans of plaintiffs. Plaintiffs shall further set forth the extent to which members of their respective classes agree or disagree with their objections or proposals.

Before 5:00 P.M., Friday, August 4, 1978, the defendants shall reply to any objections and/or proposed additions, amendments or alternative plans filed by plaintiffs. Defendants may revise any of their proposals by changing preferences, by

amending proposed plans, by offering additional proposed plans or otherwise. They may report the results of any public participation programs which they may have instituted and may adopt or reject such proposals.

In addition to participating in any programs set up by the defendants or the plaintiffs in this case, residents of the School District, and particularly parents of children who may be directly affected by any plan of desegregation may individually, or in groups through a spokesman or attorney, address to the Court, in writing, comments on any plan or plans proposed by the School Board or by the plaintiffs. Any written comment addressed to the Court should be reasoned and/or constructive in nature and should include suggestions or alternatives explaining how the plans may be improved. All comment should be signed, and should be mailed or hand delivered to:

School Desegregation Plan
Clerk, United States District Court
U.S. Courthouse
55 East Broadway
Tucson, Arizona 85701

On August 8, 1978, commencing at 8:30 o'clock A.M., there will be a hearing in this Court concerning the proposed plans. Residents of the District who wish to be heard in open Court concerning their objections and/or alternatives to the proposed plans shall include a request in their written comments. All written comment and requests to be heard must be received no later than 5:00 P.M., Friday, August 4, 1978. Those responding shall state whether they have children attending District No. 1 schools and which schools they attend. Those who speak at the hearing shall be prepared to be sworn as witnesses and may be cross-examined by the attorneys for the parties to this action.

At the August 8th hearing, defendants shall present their proposed plan or plans and

shall offer evidence in support thereof. Plaintiffs shall then present their objections to defendants' plan or plans as well as any amended or alternative plans and shall offer evidence in support of their contentions. Following the presentation of evidence by the parties, members of the public shall be given an opportunity to be sworn and to offer statements not to exceed ten (10) minutes in length. Speakers shall be heard in this order:

1. Those who have requested in writing an opportunity to speak and who are parents of children who may be directly affected by the desegregation plan;

2. Others who have requested in writing an opportunity to speak;

3. If time allows, others who appear at the hearing.

All parties to this action and their attorneys are responsible for the public

dissemination of this Order and for explaining the opportunities herein provided by the Court for public comment and participation.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 17th day of July, 1978.

s/William C. Frey
William C. Frey
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 4, 1978

Clerk, U.S. District Court
District of Arizona

By s/s
Deputy Clerk

A proposed settlement having been filed in these consolidated actions, it is necessary that members of the plaintiff classes be given notice of the proposed settlement and an opportunity to object thereto or otherwise be heard thereon.

IT IS ORDERED that a hearing is scheduled regarding the proposed settlement in the United States Courthouse, 55 East Broadway, Tucson, Arizona, on Thursday, August 24, 1978, commencing at 9:00 A.M. Any class members desiring to object to the proposed settlement or otherwise be heard may appear and be heard.

IT IS FURTHER ORDERED that counsel supporting the proposed settlement prepare a notice to the classes which explains the proposed settlement and the opportunity

to object to the proposed settlement; counsel shall submit the notice to the Court for approval.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 3rd day of August, 1978.

s/s
William C. Frey
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER APPROVING DESEGREGATION PLANS
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 11, 1978

In this Court's Order of June 5, 1978, these defendants in these consolidated cases were ordered to propose a plan designed to eliminate any vestiges of racial and ethnic segregation or discrimination, based on race or ethnicity, which were found by the Court to exist in nine schools. The plan was to be developed and submitted with all due speed so as to be subject to hearing and review and thereafter commence with the beginning of the 1978-79 academic year, if possible.

Various plans have been offered by the defendants for the upcoming school year, and their preferences have been indicated. Although all named plaintiffs were given the opportunity to object to the defendants' plans and to offer alternative plans of their own, only Alberto Sanchez has done so.

All other named plaintiffs have entered into a proposed settlement with the defendants which resolves all issues raised

in these consolidated cases. As part of the settlement, the plaintiffs, other than Sanchez, have raised no objections to the plans offered by the defendants as to the nine schools included within the Court's June 5, 1978 Order. As part of the proposed settlement, the defendants have agreed to provide better racial and ethnic balance in certain other schools starting in 1979, and have further agreed to institute various programs designed to improve the quality of education.

Because of a difference of opinion between plaintiff Sanchez and all other named plaintiffs concerning what an acceptable remedy may be, he has asked to have a "sub-class" certified which he would represent in all further proceedings in these actions. This issue is addressed in a separate Order.

Hearings were held on August 8th and 9th, 1978, at which defendants presented

evidence supporting their plans for the nine schools. Plaintiff Sanchez and the intervenor-defendants Sutton, et al., objected to parts of the plans and presented alternatives. Thereupon, parents of children in the affected schools and the public at large were provided an opportunity to present evidence, object to the defendants' plans and offer alternative plans. Over 25 people appeared and spoke on behalf of themselves, their children, friends and neighborhood and school groups.

During the course of these hearings, the Court attempted to explain to the participants the limited jurisdiction of the federal courts in these types of cases, and it is appropriate to repeat those limitations here. Under our federal system, the powers of government are divided between the United States, the individual states, and the people themselves. The administration of schools is a matter

firmly within the control of the individual states.

Arizona has delegated substantially all of its powers to the school districts, superintendents of schools, officers and elected trustees of school districts, such as the defendants in these cases. With very few limitations, they virtually have full authority concerning public education. The people control these decisions through the exercise of their right to elect officials, to engage in free debate and to petition the officials for redress of grievances. The United States may control such local school district decisions only insofar as the Fourteenth Amendment and other constitutional provisions allow.

The jurisdictional grants by Congress and other complaints filed by the plaintiffs in these actions afford this Court the authority to protect the interests of

the plaintiffs in receiving an equal educational opportunity. To the extent that intentional racial or ethnic segregation or discrimination has been found, this Court has authority to order remedies. The remedy which this Court has authority to order must work, it must work now, and it must not inflict additional burden on plaintiffs and the classes they represent, nor inflict further racial or ethnic segregation or discrimination on such plaintiffs. This Court's jurisdiction or power does not extend any further than that. Concerning all other interests, parents and others must look to their elected officials.

Federal Courts may not intrude into the business of the states any further than necessary to protect federal constitutional guarantees or rights of the people and in strict compliance with the limited grants of jurisdiction and authority rendered by Congress.

In Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977), the Supreme Court of the United States held that the power of the federal courts to restructure the operation of local and state governmental entities was not"plenary" but could be exercised only on the basis of a constitutional violation, and the scope of the remedy had to be tailored to fit the nature and extent of the constitutional violation.

If there are various plans by which the constitutional violations properly can be remedied, this Court must defer to the local officials to choose which plan to use. So long as racial and ethnic discrimination is not a factor, the defendants in this case can consider and give all other factors whatever weight they deem appropriate.

Defendants are free to do many things with which the Court may not agree, but which are outside of the area of the Court's jurisdiction or authority in these cases.

Further, even within the area of the Court's jurisdiction there are limitations on the considerations relevant to this Order. We are not at this time or in this Order concerned with the proposed settlement agreement. It will be fully considered at a later hearing; one which is now scheduled for August 24, 1978. At present, the Court must rule only on the issue of whether the defendants' proposed plans for the upcoming school year sufficiently remedy the violations heretofore found to exist with respect to nine schools. What may be done next year or thereafter is not important except to the extent that present actions may prevent certain options in the future. The fact that the plans may not be complete and permanent remedies also is presently unimportant so long as the plans are substantial beginnings and good faith efforts considering the limited time before the next school year commences.

With all of the limitations on the Court in mind, the Court has determined that the plans proposed by the defendants are acceptable remedies for the constitutional violations heretofore found.

One plan treats Brichta, Manzo and Tully elementary schools, another treats Roosevelt, University Heights, Jefferson Park and Cragin elementary schools and the third treats Spring and Safford junior high schools.

With regard to Brichta, Manzo and Tully elementary schools, the defendants prefer "Option II" of the four options which they presented to the Court. Many students who are now bussed to Brichta are driven a slightly further distance to Manzo and Tully. Those students who presently walk to Brichta continue to do so. The school attendance areas for Manzo school students would remain unchanged. Although, the composition of Manzo school

students would remain heavily minority, the Court finds that the improvement is as much as would have existed at Manzo absent constitutionally objectionable School Board actions in previous years. The same is true with respect to Tully.

The objections heard by the Court from the public were that the preferred plan of defendants is inadequate to achieve real integration, that the plan is merely temporary and may lead to more than one change of school for some children when this plan must be revamped, and that other plans can better perform the functions of integration and quality education. The Court would be less than candid if it did not note that some offered alternatives have attractive qualities; however, that is not the issue here.

None of the objections presented to the Court go to the adequacy or inadequacy of "Option II" to remedy the segregative effects

found by the Court to have been caused by past intentional acts of the defendants. The Court finds that such limited effects would be adequately remedied by this plan. The defendants will comply with the Court's Order of June 5, 1978, by instituting "Option II". The plan's effect on quality of education, neighborhood cohesiveness and the children's emotions is of necessity left to the defendants' judgment.

Nothing in this Order prevents the parents and all parties to this action from seeking and/or instituting a different plan or plans in the future as long as it is also compatible with the Court's findings and conclusions.

With regard to Roosevelt, University Heights, Jefferson Park and Cragin elementary schools, the defendants submitted seven options and originally stated their preference for "Option II". As part of the proposed settlement and apparently in some compromise, the defendants endorsed

"Option III" instead. At the recent hearings, evidence to support both was introduced and the relatively small difference between them was not the subject of any objections. Their comparability and sufficiency must be considered.

Both plans call for Roosevelt and University Heights to be closed. Some Roosevelt area students would walk to Roskruge; however, most would be bussed to Cragin or Blenman. Those University Heights students living west of Euclid would be bussed to either Jefferson Park or Davidson, depending on the option put into effect. All other University Heights area students and those Jefferson Park students living west of Campbell would attend Jefferson Park. Children living east of Campbell would walk to either Blenman or Cragin. Children living north of the Rillito River would be bussed to Davidson and Whitmore instead of Jefferson Park and Cragin.

There is no doubt that both of these two plans have sufficient integrative effect to comply with the June 5, 1978, Order of the Court. Neither is there any serious question of the school closings being compatible with the Court's previous findings concerning effects or vestiges of past segregation. However, such closures are not dictated by the Court's findings or conclusions. There is no doubt however that closure of these schools and a redistribution of the students as presently contemplated, prior to the institution of these lawsuits would have been a positive factor in favor of defendants. The plaintiffs justifiably complained of the retention of these schools, notwithstanding the fact that it was done at least in part, if not in whole, to accommodate members of the plaintiffs' classes. The only question before this Court with respect to these plans is whether they may place an undue

burden on the minority students they are meant to benefit. The Court expressed doubts and some misgiving about this. Those doubts and misgivings have been dispelled by a careful analysis by the Court of the legal principles involved, the objections and the plans; particularly in view of the longer range possibilities such plans afford.

At the recent hearings it was made clear to the Court by parents that they indeed have affection and concern for their schools, think highly of the present teachers and programs, and do not feel that they live in "dying" or decaying neighborhoods. They present evidence calling the reasons for closure into question, and they request more time to find more evidence and to present better alternatives.

If Roosevelt stays open it will have 178 students from its present area in attendance, and 97 students from 8 miles

away. There are 5 crossing guards for children attending Roosevelt -- more than for any other school. This is because the children must cross Stone, Drachman (Interstate 210, the commercial route of Interstate 10), Speedway, Sixth Avenue and Main Avenue in order to reach Roosevelt. The defendants are free to consider such factors and to consider the potential harm to students and potential legal liability on the District. The school itself is in an area which is immediately surrounded by Pima Community College, motels, business operations and "adult" entertainment with little residential use. This is true to a lesser extent of the larger area which has had its student population reduced from a high of 349 students to the present 178. The potential for a "revitalized" family type neighborhood for the Roosevelt area appears slim indeed.

The school is old and would need extensive improvements for continued and

expanded use. There was evidence that the school district can probably sell the building for a substantial sum, and could save operating expenses by closing the school and having fewer under utilized schools to operate. The school board certainly has the authority and perhaps a duty to close the school unless the impact on minorities is discriminatory. The fact that there are other under utilized schools within the District is not relevant to the issue presently before the Court.

The Roosevelt area children who will walk to Roskruge are not adversely affected. The children who will go to Cragin and Blenman will have to be bussed 4 miles; however, they will attend larger, more updated schools with more educational programs available, and they will attend better integrated schools. The Court cannot say in light of all the factors here

involved that it is racially discriminatory to compel one group of children to ride a bus 4 miles in order to prevent another group from needing to ride 8 miles. Moreover, the Court is informed that a new school closer to Roosevelt than Jefferson Park is to be seriously considered for the future, and the Court can hereafter order detailed consideration if it becomes necessary within the scope of the issues involved in these cases. Parents surely will have an opportunity to participate and to express themselves in such consideration.

Roosevelt does not have to be closed as far as the Court is concerned, but under the circumstances the Court will not prevent it, and it appears doubtful that the Court has a legitimate option to do so.

As found by the Court on June 5, 1978, the defendants appropriately ordered the closure of University Heights near the commencement of these actions. Because of

the instant actions, the District stayed the closure order. Now the defendants want to exercise their authority and carry through their initial determination which adds most of the University Heights area to Jefferson Park. Since all children living east of Euclid are within walking distance of Jefferson Park, the Court does not find that any minority students are discriminated against by such. In "Option II" the children west of Euclid are barely out of walking distance to Jefferson Park and are provided transportation to school. Certainly the 4th, 5th and 6th grade students who participate in after-school adtivities can adequately walk or ride bicycles home west of Euclid. "Option II" must be approved.

In "Option III" those students west of Euclid will be bussed to Davidson, and there may be some disruption of parental involvement and after school activity. The

Court must consider whether this inconvenience shows an undue burden on minority students when the reasons for closure of University Heights are considered. While there is dispute over the estimated costs of roof repair, there appears no dispute that substantial repars must be undertaken on the roof of University Heights if it remains open. Some clasrooms are too small according to modern standards and the site is inadequate. The University of Arizona is expanding into the eastern portion of the school's attendance area north of Speedway; there are parking lots, the law school, the medical school, and most likely more of the school's attendance area will be absorbed by the University. Apartments in the area are generally to accommodate University students with no children, even though some graduate students do have school age children.

The Court realizes that the people

want to maintain the present status of their schools despite these problems and further considers that the area may possibly improve and gain a few families with elementary age children in the future; however, the decision to close University Heights is not irrational, or motivated by racial or other unconstitutional considerations, nor is it so burdensome on minority students that this Court can legitimately prevent it. For this Court to be persuaded to exercise its power so as to thwart the closure of either Roosevelt or University Heights would be to usurp the authority and function of the District officials by considering matters beyond the scope of the issues involved in these cases.

In regard to junior high schools, the defendants propose to close Spring, send its students mostly to Maxwell, partly to Safford and partly to Mansfeld.

Although Safford and Mansfeld students and parents object to language in the plan and the proposed settlement agreement which suggests that Safford and Mansfeld be closed in the future, no real objection was voiced to the plan as it will operate in the coming school year. Future closure, it appears, can and must be studied by all concerned over the next few years. Again, however, and with respect to the objections or concerns expressed to the Court about possible closure of Safford and Mansfeld, the previous remarks of the Court about its limitations are appropriate.

Spring parents object to losing their neighborhood junior high school; however, all children will live within approximately four miles of their new junior high, and this distance is not at all excessive when compared to other children around the district. The receiving junior highs will have much better racial balances and will

have more students, which allows a broader range of programs. The Court finds no detriment to the plaintiffs' classes sufficient to warrant preventing the defendants' "Option V" from being adopted.

Some of the arguments regarding the benefits of keeping Spring as a minority dominated haven for parents who want such a school cannot be taken into account consistently with the Constitution of the United States or the issues decided by this Court.

IT IS ORDERED that the options preferred by defendants are approved as being in compliance with this Court's Order of June 5, 1978, for operation in the 1978-1979 academic year.

IT IS FURTHER ORDERED that all parties shall study the operation of these plans of desegregation, formulate additional plans for future years, and shall without undue delay recommend preferred plans for

future implementation. A report shall be made to the Court by all parties hereto of the operation of the approved plans as soon as possible following the end of the first term of the 1978-79 school year. Such report shall contain, but not be limited to, such matters as minority student acceptance and progress, successes and/or failures or problems resulting from the plans and any parental matters resulting from such plans.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 11th day of August, 1978.

/s/
William C. Frey
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER DENYING CERTIFICATION OF A SUBCLASS
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 11, 1978

W. J. FURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY /s/
DEPUTY CLERK

Plaintiff Sanchez has filed a motion to create a sub-class "consisting of all Mexican-American or Hispano-American students or students with Spanish surnames within grades K through 8 in Tucson School District Number One and the parents, guardians and/or next friends of those students, who now attend or will in the future attend a school subject to or proposed to be, immediately or in the near future, closed by order of this Court or proposed settlement of the parties". Originally, a class of all Mexican-American students who attended school in the district and their parents was created, and plaintiff Sanchez was certified as one of the representatives of the class.

Once a decision was rendered concerning the liability of the district, settlement negotiations were commenced and eventually led to the point that the closure of some minority dominated schools became probable. At that point, a difference of opinion arose between plaintiff Sanchez and other named plaintiffs, and he sought and was allowed separate counsel for himself. He also sought to represent a sub-class. Hearings were held and memoranda were filed.

A review of the pleadings and testimony shows that the views of plaintiff Sanchez and those of the overall class of plaintiffs are divergent only insofar as the proposed remedial plan is concerned. His objections can be summarized as follows. Closure of Roosevelt, University Heights and Spring places the burden of desegregation unevenly upon the Mexican-American sub-class proposed. Closure also promotes

or maintains segregated residential patterns and segregated schools. Other plaintiffs would likely assert the same positions if it were not for the proposed settlement.

There are at least two sufficient reasons for denying plaintiff a sub-class. First, plaintiff Sanchez and many other proposed sub-class members have already objected to the defendants' plans for closure, and the matter has now been decided against them. This is not merely a preliminary examination of the merits, but a full ruling on the merit of their position. It would be a futile act to now create a sub-class of such objectors.

Secondly, the other plaintiffs have only agreed to these closures as part of an overall settlement. Concessions of viable issues are necessarily made in settlements and Title 28, United States Code, Federal Rules of Civil Procedure 23(e) ade-

quately provides for class members who object to certain concessions. There will be a hearing on the proposed settlement at which all class members will have an opportunity to be heard.

If the proposed settlement is approved, plaintiff Sanchez can appeal the approval and this Order. If it is not approved and if it appears that there are real legal conflicts among the class, a further motion for sub-class certification could be filed.

It further appears that the proposed sub-class is too vague to be a meaningful class and to assume that there are common issues of fact and law applicable to such a proposed class different from those of the class in general, assumes too much.

An additional defect in the motion is that there is no showing that the other plaintiffs and their attorneys do not adequately represent the interests of the whole class, including the proposed sub-

class.

The evidence presented by plaintiff Sanchez fails to show any real conflict or antagonism to the interests of the proposed sub-class, merely differences of opinions with some of the proposed sub-class as to the remedy this Court should adopt. If dissatisfaction of a class member, or group of such members, with actions taken on their behalf could rise to the status of a conflict of interest, there would be few class actions without a multitude of sub-classes. Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 at 835 (9th Cir. 1976) cited by plaintiff Sanchez seems to recognize this and is of no aid to him. That case appears also to recognize that there will be dissident class members with respect to a settlement and that their interest can be adequately protected without the creation of a sub-class even where they have separate counsel.

IT IS ORDERED that the motion of plaintiff Sanchez to create a sub-class is denied.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith mail a copy of this Order to all counsel of record herein.

DATED this 11th day of August, 1978.

/s/
William C. Frey
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER APPROVING NOTICE OF PROPOSED SETTLEMENT
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 14, 1978

A proposed settlement has been filed in these consolidated actions. Pursuant to Title 28, United States Code, Federal Rule of Civil Procedure 23(e) it is necessary to give notice to the members of the plaintiff classes of the proposed settlement and of their right to object.

Plaintiff Sanchez has objected to the form of the notice because it does not contain what he considers to be a sufficiently detailed explanation of the options mentioned therein. He also objects to the short period of time allowed between dissemination of the notice and the hearing on objections to the proposed settlement.

Because of the great amount of local publicity concerning all prior orders and proceedings in this case, it appears that the form of notice is sufficient. For the same reason, and because school will commence in three weeks, the Court also feels that

the time allowed for objections is sufficient.

IT IS ORDERED that:

1. The attached form of notice in English is approved for signature by a Clerk of this Court. A Spanish translation of such notice shall be prepared and agreed upon by counsel for the Mexican-American class of plaintiffs and defendant Tucson United School District No. 1; same shall be submitted to the Clerk of this Court for signature no later than 10:00 A.M., Wednesday, August 16, 1978.

2. Said notice both in English and Spanish shall be published by Defendant Tucson Unified School District No. 1, in a newspaper or newspapers of general circulation in Tucson, Arizona, on five (5) different days commencing as soon as possible after 10:00 A.M., Wednesday, August 16, 1978, and ending on

or before August 28, 1978.

3. The parties and their counsel shall cooperate and use their best efforts in disseminating the notice by other means so as to reach as many members of the plaintiff classes as is reasonably possible.

4. The costs of translation of the notice shall be billed to the Clerk of this Court.

5. Objections to the proposed settlement shall be heard in Court on Wednesday, August 30, 1978, commencing at 8:30 A.M.

6. Counsel for all parties to the proposed settlement agreement herein shall make a written report to the Court by 8:30 A.M., Wednesday, August 30, 1978, of the effort made to disseminate the notice to the class members.

IT IS FURTHER ORDERED that the

Clerk of this Court forthwith notify all counsel of record herein by telephone of the entry of this Order and mail a copy of this Order to all counsel of record herein.

DATED this 14th day of August, 1978.

s/William C. Frey
William C. Frey
United States District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NUMBER 1, et al, Defendants,	

FILED: August 22, 1978

IT IS ORDERED:

The Motion of plaintiff Sanchez for Discovery is denied as to Item 1 contained in his motion. The issue as to the desegregation plan adopted by the Court is now moot by virtue of the Court's Order of August 11, 1978.

The said Motion for Discovery is granted as to Items 2, 3, 4, and 5. Plaintiff Sanchez shall forthwith proceed with reasonable interrogatories, depositions and requests for production and/or admissions.

Any objections to any discovery attempted by plaintiff Sanchez will be heard immediately upon the filing thereof.

IT IS FURTHER ORDERED that the Clerk forthwith notify counsel for all parties of this Order by telephone and thereafter either furnish copies of this Order or mail same to such counsel.

DATED this 22nd day of Autust, 1978.

s/William C. Frey
William C. Frey
United States District Judge

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SUTTON, et al, Defendants-Intervenors.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF ORDER APPROVING SETTLEMENT
MENDOZA, et al, Plaintiffs, UNITED STATES OF AMERICA, Plaintiff-Intervenor, vs. TUCSON SCHOOL DISTRICT NO. 1, et al, Defendants.	

FILED: August 31, 1978

W. J. FURSTENAU, CLERK
DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY /s/
DISTRICT CLERK

These cases proceeded to trial and the Court made and entered substantial findings of fact and conclusions of law. Thereafter counsel for plaintiffs filed objections and motions pertaining to such findings and conclusions but stipulated that a ruling on such matters be deferred by the Court to allow counsel an opportunity to explore the possibility of a settlement.

Counsel entered into a proposed settlement subject to class hearings and Court approval. The proposed settlement included approval by plaintiffs of a desegregation plan submitted to the Court by defendants pursuant to Court Order and designed to

remedy existing effects of past discriminatory acts or policies.

The Court conducted public hearings to receive evidence from those affected by such desegregation plan. Some of the plaintiff class members appeared and testified in opposition to such plan. The opposition by class members to the desegregation plan came from those opposed to the closing of three schools (Roosevelt Elementary, University Heights Elementary and Spring Jr. High). The Court found the desegregation plan approved by the parties to be fair, equitable, curative of the existing effects from past discrimination and constitutionally proper.

Once the parties had arrived at a tentative settlement, one of the plaintiffs in Case No. 74-204 (Sanchez) apparently became dissatisfied with the proposed desegregation plan and sought separate counsel. Such substitution of counsel was accom-

plished and new counsel for plaintiff Sanchez initiated objections to the proposed settlement and the proposed desegregation plan.

The Court directed notice of the proposed settlement and scheduled a hearing thereon. The hearing produced, for the most part, response from the same dissenters and objectors to the desegregation plan. Essentially, the argument in opposition to the proposed settlement involved dissatisfaction with school closures and student assignment. More specifically such dissatisfaction centered on the closing of Roosevelt Elementary and Spring Jr. High. Beyond this, the hearings produced little by way of objection to the proposed settlement. A few of the objectors apparently went door to door with a petition listing objections to the proposed settlement, none of which went to the fairness of the settlement and most of which were irrelevant.

About 90 signatures were so collected. However, the evidence fails to show that those signatures represent bona fide members of the class or what inducement, if any, caused the signatures.

Eleven class members appeared and testified in opposition to the settlement and as previously stated, many if not most, of those were those who previously objected to the desegregation plan and, in general, they simply restated the same objections previously made to the Court. In addition to such objectors noted above, the Court received six letters opposed to the proposed settlement. Further, counsel for plaintiff Sanchez submitted pleadings indicating he was representing 21 objectors. Approximately seven or eight of such appeared and testified.

Without determining the validity of the alleged class standing of those sending letters and signing the petition, the ob-

jectors, including in some instances husband and wife, totalled 121; the two classes involved in these cases total 18,500 students.

Much time was consumed at the public hearing by the objectors' evidence concerning the pilot program on the "Spaulding Method" for language arts instruction. Not only did the evidence fail to show that the inclusion of such a pilot program was unfair or discriminatory, it failed to take into account that the program was strictly a volunteer program limited to 30 students. Counsel for plaintiffs in Case No. CIV 74-204 has filed a comprehensive memorandum on this issue which adequately covers the propriety of the inclusion of such a program in the settlement agreement. This is adopted by the Court.

The objectors and counsel for plaintiff Sanchez make such of the inadequacy of the scope and form of the notice, yet their

testimony reveals widespread actual notice. No doubt given more time and more opportunity, the hard core of objectors could have marshalled more numbers of objectors, but the evidence fails to reveal that such objectors would have had objections different in kind from what was received and considered. The notice in this case was fair and adequate as is shown by the record.

These cases were fully tried on their merit in a vigorous adversary proceeding. Most, if not all, of the objections, other than those going to the Court's remedy, i.e., closure of schools and student assignment, involved issues that were tried and ruled upon. The objections received in this case simply were not meritorious.

The standard to be applied by the Court in reviewing a proposed settlement of a class action is whether the proposed settlement "is fair and reasonable". Bryan v. Pittsburg Plate Glass Company, 494 F.2d

799, 801 (3rd Cir. 1974), cert. denied, 419 U.S. 900 (1975). Accord, Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); In re King Resources Company Securities Litigation, 420 F. Supp. 610, 625 (D. Colo. 1976); Lewis v. Newman, 59 F.R.D. 525, 527-28 (S.D.N.Y. 1973); West Virginia v. Charles Pfizer and Company, 314 F. Supp. 710, 740 (S.D.N.Y. 1970), affirmed, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). As the Court stated in Lewis v. Newman, supra:

> "The test is often more concisely phrased--is the settlement 'fair, reasonable, and adequate.'" 59 F.R.D. at 527-28.

The determination whether a proposed settlement of a class action is fair, reasonable and adequate is committed to the sound discretion of the trial court. Grunin v. International House of Pancakes,

513 F.2d 114, 123 (8th Cir. 1975); Newman v. Stein, 464 F.2d 689, 692 (2d Cir. 1972); Ace Heating and Plumbing Company v. Crane Company, 453 F.2d 30, 34 (3rd Cir. 1971).

The principal factors to be considered by the district court in determining whether to approve a proposed settlement of a class action were listed by the Second Circuit in City of Detroit v. Grinnell Corporation, 495 F.2d 448, 463 (2d Cir. 1974). To the extent applicable to a case such as this, those factors are as follows: (1) The relative strengths and weaknesses of plaintiffs' legal position; (2) the risks of establishing liability; (3) the complexity, expense and likely duration of the litigation; (4) the state of the proceedings and the amount of discovery completed; (5) the ability of the defendants to withstand a greater judgment; (6) the reaction of the class to the settlement; (7) the range of reasonableness of the

settlement terms in light of the best possible result. See also, Bryan v. Pittsburg Plate Glass Company, supra, 494 F.2d 799 (erd Cir. 1974), cert. denied, 419 U.S. 900 (1974). Unquestionably, the most significant factor is the strength of the plaintiffs' case. See Marshall v. Holiday Magic, Inc., supra, 550 F.2d 1173, 1178 (9th Cir. 1977). As the Supreme Court has stated in an analogous context, the court should "compare the terms of the compromise with the likely rewards of further litigation" in assessing the fairness, reasonableness and adequacy of a proposed settlement. Protective Committee for Independent Stockholders of TMT v. Anderson, 390 U.S. 414, 425 (1968).

Another factor (not listed in Grinnell) is whether the proposed settlement is advocated by a government agency. If so, the courts generally give this factor great weight in assessing the fairness

and adequacy of the settlement. Marshall v. Holiday Magic, Inc., supra, 550 F.2d 1173, 1178 (9th Cir. 1977). In this case the government intervened on behalf of the plaintiffs and is urging the adoption of the settlement agreement.

Considering all of these factors in light of the facts and circumstances and present posture of these cases, it is clear that the proposed settlement is fair, reasonable and adequate to all members of each class.

IT IS ORDERED:

1. That the Stipulation of Settlement filed herein, a copy of which is attached hereto (as amended on page 6, paragraph 13) is approved, merged herein and shall be the controlling Order of the Court, notwithstanding any prior Orders or Findings entered herein, as provided in paragraph 23 of the said Stipulation of Settlement.

2. That all pending motions filed herein to alter or amend the Court's Findings of Fact and Conclusions of Law, are denied as moot.

The Clerk is directed to mail a copy of this Order to all counsel of record herein.

DATED this 31st day of August, 1978.

/s/
William C. Frey
United States District Judge

APPENDIX J

J. Wm. Brammer, Jr.
Richard M. Yetwin
DeCONCINI McDONALD BRAMMER YETWIN
& LACY, P.C.
240 North Stone Avenue
Tucson, Arizona 85701
Telephone: (602) 623-3411

Attorneys for Defendants other
than Defendant Lohr

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROY and JOSIE FISHER, et al,	)
Plaintiffs,	)
UNITED STATES OF AMERICA,	)
Plaintiff-Intervenor,	)
vs.	)
ANITA LOHR, et al,	)
Defendants.	)
and	)
SIDNEY L. SUTTON, et al,	)
Intervenors-Defendants.	)

MARIA MENDOZA, et al,	)
	)
Plaintiffs,	)Nos.
	)
UNITED STATES OF AMERICA,	)CIV-74-90-TUC-WCF
	)
Plaintiff-Intervenor,	)CIV-74-204-TUC-WCF
	)
	)
vs.	)
	)STIPULATION OF
TUCSON SCHOOL DISTRICT NO. 1, et al,	)SETTLEMENT
	)
	)
Defendants.	)
	)

FILED: August 11, 1978

W. J. FURSTENAU, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY /s/
DEPUTY CLERK

On June 15, 1978, Plaintiffs Fisher, et al., and Plaintiffs Mendoza, et al., filed motions to Alter or Amend Findings of Fact and Conclusions of Law entered by the Court on June 5, 1978, in these consolidated school desegregation cases. Plaintiff-Intervenor United States sup-

ported the motions which were filed by Plaintiffs. Those motions were argued before the Court on June 28, 1978, and are presently pending.

Subsequent to the hearing on Plaintiffs' motions, counsel for all parties have conferred and agreed to the terms of a final settlement of this case, as contained in this stipulation, that will make it unnecessary for the Court to decide the pending motions and that will finally resolve this litigation. As evidenced by the signatures of their counsel below, the parties hereby stipulate and agree as follows:

1. The parties file herewith a joint motion requesting the Court to enter the attached Settlement Order, which has been signed by all parties who have appeared in this action.

2. Commencing with the 1978-79 school year and thereafter during the term of this

agreement, the Defendants will operate Brichta, Tully, and Manzo elementary schools in accordance with Option II of the plans submitted to the Court on July 17, 1978, and will operate Roosevelt, University Heights, Cragin, and Jefferson Park elementary schools in accordance with Option III of the plans submitted to the Court on July 17, 1978, as originally recommended by the District staff, unless alterations are made or approved as provided herein in paragraphs 20, 21 or 23.

3. Commencing with the 1978-79 school year and thereafter during the term of this agreement, the Defendants will operate their junior high schools in accordance with Option V of the plans submitted to the Court on July 17, 1978, provided that the closure of Mansfeld and Safford Junior High Schools and the construction of a new school to replace them is undertaken as soon as practicable, unless alterations

are made or approved as provided herein in paragraphs 20, 21 or 23. In the event construction of the new junior high school is not completed within a reasonable period of time, the Board will implement alternative measures to desegregate Safford Junior High School.

4. Commencing with the 1979-80 school year and thereafter during the term of this agreement, the Defendants shall alter the student assignment patterns for Borton and Holladay Elementary Schools under a plan of student assignment which will be developed in the manner described in paragraph 8 below, so as to reduce the minority enrollment of these schools below approximately 50 percent minority.

5. Commencing immediately, the Defendants shall implement a process for parent participation to examine the future student assignment patterns for Davis, Drachman, and Carrillo Elementary Schools.

The public process shall consider whether these schools should be closed, consolidated, or continued and make recommendations to Defendants on the educational specifications for either the continuation of the schools or the contruction of a new elementary school(s) in the inner city, if such is to be the case.

6. Commencing with the 1979-80 school year and thereafter during the term of this agreement, the Defendants shall alter the student assignment patterns for Utterback Junior High School under a plan of student assignment which will be developed in the manner described in paragraph 8 below, so as to reduce the minority enrollment at that school below approximately 50 percent.

7. Commencing with the 1979-80 school year and thereafter during the term of this agreement, the Defendants will ensure that the junior high school into which

the graduates of Pueblo Gardens and Cavett Elementary Schools matriculate shall not exceed approximately 50 percent minority student enrollment, under a plan to be developed in the manner described in paragraph 8 below.

8. The student assignment plans required by paragraphs 4, 5, 6 and 7 above shall be developed under the following procedure and schedule:

(a) The Defendants will immediately implement a process or processes for public participation, which will include representatives of those to be affected, in the development of alterations of student assignments for the schools indicated.

(b) The plans for student assignment, if any, developed through the above public process or processes shall be reviewed by the Defendants and shall be provided to counsel for Plaintiffs and Plaintiff-Intervenor for a reasonable

period of review of not less than ten (10) days and the parties to this Stipulation shall determine by November 30, 1978, whether the plans so developed are acceptable to them;

(c) If the Defendants, the Plaintiffs or the Plaintiff-Intervenor find the plans developed through the above public process unsatisfactory, the Defendants shall independently examine the issues and produce a plan for alteration of student assignments as provided in paragraphs 4, 5, 6 and 7 above, for presentation to the Court and to Plaintiffs and Plaintiff-Intervenor on or before December 31, 1978;

(d) The parties shall confer and on or about the 31st of January, 1979, shall inform the Court whether they have been able to agree on the plan, or a modification of the plan, presented pursuant to subparagraph 8(c) above;

(e) If the parties have agreed, the student assignment adjustments shall be incorporated into a Stipulation of Settlement No. 2 which will be jointly submitted to the Court for its approval in the form of an order containing the same terms as paragraph 1 of the Settlement Order filed herewith;

(f) If the parties cannot agree, the issues will be submitted to the Court for resolution consistent with the terms of this Stipulation.

9. The Defendants shall restructure the assignment of faculty at Pueblo Gardens and Cavett Elementary Schools so that a disproportionate number of Black teachers, taking the District as a whole, is not on the faculty of either school. Implementation of such reassignments shall be completed no later than the commencement of the fall semester of the 1979-80 school year.

10. In addition to the reassignment of Black teachers outlined in paragraph 9 above, the Defendants shall examine the assignment of all Black teachers during the 1978-79 school year. Necessary reassignments shall be implemented so that a disproportionate number of Black teachers, taking the District as a whole, is not on the faculty of any given school commencing with the fall semester of the 1979-80 school year.

11. The Defendants shall adopt an additional statement of Non-Discrimination in Employment and establish uniform procedures with respect to the hiring, placement, and promotion of District employees, in the form of the statement which is attached hereto as Exhibit "A".

12. The Defendants will develop and implement in-service training programs which will be required of all District employees involved in implementing this

agreement and the student assignment plans adopted pursuant to paragraphs 2 through 7 above.

13. The Defendants shall implement good faith efforts, with specific input and recommendations from Black and Mexican-American parents, to ensure that no student is discriminated against in the implementation of the District's uniform suspension and expulsion policy.

14. The Defendants shall conduct a careful, good faith examination of the testing instruments used by the Defendants to ensure that no student is discriminated against in this aspect of the District's educational program. The Defendants' efforts shall include the utilization of qualified personnel to assess tests and responses that are unique to Black students. In addition, qualified parents, or their qualified representatives, and Black edu-

cators shall assist the Defendants as they complete the design and implementation of the "Programmatic Recommendations to assist in the Quality Education of Black Students in Tucson," a document previously submitted by Plaintiffs Fisher.

15. The Defendants shall not admit a student to a bilingual instructional program without specific parental permission. No student shall be admitted to such a program without an explanation of the nature of the program and the available options, including programs of standard English as a second dialect (e.g., B.A.S.E.), to the student's parent(s). As a part of the Defendants' efforts to evaluate the bilingual instructional programs, there shall be included external evaluation of these programs to determine whether there have been adverse effects on non-program students, with the objective of correcting any such effects.

16. Commencing with the fall semester of the 1978-79 school year, the Defendants shall offer a one-year pilot instructional program utilizing the "Spalding Method," provided that at least 25 students shall signify interest in such a program in writing, by August 14, 1978, including an acknowledgment that they have been advised of the Defendants' view of the "Spalding Method." Enrollment in the pilot program shall be limited to 30 students.

(a) The pilot program shall be at Menlo Park School. Children enrolled in that program who otherwise would qualify for transportation on a daily basis and who desire it shall be provided transportation by Defendants.

(b) Commencing immediately, the Defendants will implement a process to select a teacher to instruct the pilot instructional program. At a very minimum,

the person selected to instruct this program should have (1) experience in teaching the "Spalding Method;" (2) experience in having taught that method to Mexican-American children; and (3) demonstrated past success in teaching Mexican-American children through the "Spalding Method."

17. On April 15, 1979, October 15, 1979, April 15, 1980 and for each April 15 thereafter during the term of this stipulation, the Defendants shall file with the Court and serve on each party a report showing the racial and ethnic student enrollment of all schools involved in the above plans to that date; the faculty and staff of each school together with any reassignments of faculty and staff and any reasons therefor; and a report showing all programmatic changes pursuant to this stipulation and the effectiveness of such changes. In addition, during the term of this stipulation, counsel for Plaintiffs

and Plaintiff-Intervenor shall have reasonable access to Defendants' records for these purposes.

18. An independent citizens' committee will be established by the Defendants to review and report to the School Board the progress of the Defendants' compliance with the terms of this stipulation. This "citizens'" committee will include one member selected by the Plaintiffs Fisher, et al., and one member selected by the Plaintiffs Mendoaz, et al. In addition, the Board shall select citizens of diverse ethnic and racial backgrounds, including but not limited to Mexican-Americans, Blacks, Anglos, Orientals and Native Americans.

19. Defendants will not engage in any acts or policies which deprive any student of equal protection of the law whether by intentional segregation or discrimination based on a student's race or ethnic group.

20. Defendants will not undertake the construction of new schools or of permanent additions at existing schools without specific authorization of the Court. Nothing in this stipulation shall preclude the construction of new schools in the future if the construction of such schools is deemed to be in the best interest of the community and not inconsistent with on-going efforts to reduce segregation, nor shall anything herein preclude revision of student transportation patterns for the purpose of having the effect of reducing or eliminating the transportation of students called for in this stipulation, consistent with on-going efforts to reduce segregation.

21. Hereafter, and until further order of the Court, all acts and/or policies of the District which substantially affect the racial or ethnic balance in any school in the District and/or which are

discriminatory because based on race or ethnicity of any students in the District schools, shall be subject to Court review in these cases.

22. After five full school years of operation under the terms of this agreement and the student assignment plans adopted pursuant to this stipulation, the Defendants may on or after July 1, 1983, move the Court to dissolve the Settlement Order and dismiss these actions, with prejudice, unless the Plaintiffs or the Plaintiff-Intervenor, within at least thirty (30) days after service of such motion, object to the dissolution of the Settlement Order and the dismissal of these actions on the grounds that the Defendants have failed to comply with the terms of this agreement, or other applicable orders entered by the Court herein. If such an objection is filed, the Court shall set a hearing as soon thereafter as

possible to determine the appropriate disposition of this action.

23. Once this Stipulation of Settlement becomes effective, the rights and obligations of the parties shall be determined solely by its terms and the terms of any subsequent stipulations or orders entered herein pursuant to it. Assuming that the expectations for student enrollments set out in the plans approved by the Court pursuant to this Stipulation are substantially met through the 1979-80 school year, the plan will be deemed to have been implemented insofar as student assignments are concerned in accordance with this Stipulation. Plaintiffs, Plaintiff-Intervenor and Defendants shall retain all rights and remedies provided by law or equity and the federal rules of procedure in seeking enforcement or relief from this and any subsequent stipulations and orders, including the right to seek

review of any order enforcing or refusing to enforce such stipulations. Further, in seeking enforcement of or relief in any federal court from the time of this stipulation, no party may rely upon prior findings and conclusions in this case to interpret the terms of this stipulation or to determine the rights and obligations of the parties thereunder.

24. This stipulation shall become effective upon the Court's entry of the Settlement Order filed herewith and the Court's approval of the Stipulation of Dismissal, concerning Counts 2, 3, 4, 5, 6 and 7 of the Amended Complaint filed on behalf of Plaintiffs Mendoza, et al. If the Court fails to enter the Settlement Order and Order approving the Stipulation of Dismissal, this stipulation becomes void ab initio.

25. Any order entered in conjunction

with paragraph 22 above, shall be considered as fully and finally terminating these cases, and resolving any and all disputes between the parties, including all class members, in the above captioned causes.

26. Defendants shall pay to counsel for all Plaintiffs as and for all their attorneys' fees and costs, both past and future, except to the extent of any attorneys' fees and costs incurred by Plaintiffs in the future as a result of Defendants' failure to comply with the terms and conditions agreed to herein, the aggregate sum of Five Hundred Thousand Dollars ($500,000.00), to be payable in two (2) installments, and to be divided among Plaintiffs' counsel as they may see fit. The two installment payments are to be made as follows and are conditioned upon counsel for Defendants being first provided by counsel for Plaintiffs with spe-

cific documentation in the form of time and expense records and vouchers which, in the reasonable opinion of Defendants' counsel, support such payment:

(a) The first installment shall be Two Hundred Fifty Thousand Dollars ($250,000.00), payable as soon as is reasonably possible after the Court's approval and entry of both the Settlement Order filed herewith and Order approving the Stipulation of Dismissal;

(b) The second installment shall be Two Hundred Fifty Tousand Dollars ($250,000.00), payable as soon as is reasonably possible after the entry of the Court's Order which is contemplated by paragraph 8(e) or 8(f) above, further providing that this second installment shall not be paid prior to July 10, 1979.

27. Anita Lohr may be dismissed as a Defendant in these actions.

Stipulated and agreed to this 8th day of August, 1978.

/s/
Rubin Salter, Jr.
Attorney for Plaintiffs
Fisher, et al.

Stipulated and agreed to this 8th day of August, 1978.

/s/
William J. Maledon
Attorney for Plaintiffs
Fisher, et al.

Stipulated and agreed to this 8th day of August, 1978.

/s/
Michael O. Zavala
Attorney for Plaintiffs
Mendoza, et al.

Stipulated and agreed to this 8th day of August, 1978.

/s/
Morris J. Baller
Attorney for Plaintiffs
Mendoza, et al.

Stipulated and agreed to this 11th day of August, 1978.

/s/
J. Wm. Brammer, Jr.
Attorney for Defendants other than Defendant Lohr

Stipulated and agreed to this 8th day of August, 1978.

/s/
John R. Moore
Thomas M. Keeling
Louie M. Stewart
Attorneys for Plaintiff-Intervenor United States of America

NON-DISCRIMINATION IN
EMPLOYMENT STATEMENT

It shall be the policy of Tucson Unified School District to adhere to all state and federal constitutional and statutory racially non-discriminatory criteria regarding the recruitment, hiring, assignment, promotion, demotion, and dismissal of any certified and classified staff.

The Superintendent of Tucson Unified School District shall develop procedures which shall insure that its schools are not racially indentifiable solely as a result of its faculty and staff assignments.

The Tucson Unifoed School District, its Board, and administration shall follow those policies and procedures so as to prevent the creation of identification of schools by reference to disproportionate

EXHIBIT "A"

racial composition of the faculty and staff, bearing in mind, however, that the test is a balance of faculty and staff by qualifications for subject and grade level and then by experience and race.

The Board will regularly review its hiring and promotion policies in Tucson Unified School District so as to ensure the absence of any discrimination or inequities.

Consistent with the General Provisions stated above, the Tucson Unified School District Board of Education directs the Superintendent as follows:

a) To promote the consistent implementation of this policy at all local levels, the Superintendent or his single, specific deisgnee, shall be personally responsible for directing all of the personnel activities within the district.

b) All recruitment and promotional requirements must be reviewed for the purpose of assuring that such requirements cannot purposely or inadvertantly discriminate against any class of individuals.

c) Uniform recruitment evaluation devices or tests shall be used.

d) A uniform grievance and hearing procedure shall be available to individuals who allege to have been discriminated against, due to race, color, sex, national origin, religion or age.

e) Uniform procedures shall be established to assure equal promotional opportunities for all qualified employees regardless of race, color, sex, national origin, religion, or age.

7/12/78

APPENDIX K

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3352

MARIA MENDOZA, ETC., ET AL.,

Plaintiffs-Appellees,

and

ALBERTO SANCHEZ, NADINE SANCHEZ, BETTY SANCHEZ, GEORGE SANCHEZ, ERNEST SANCHEZ AND JOHN SANCHEZ,

Plaintiffs-Appellants

and

JULIA O. FLOREZ, BILLIE GUTIERREZ, THERESA MEDINA, BETTY M. GRANILLO, CAROL CRUZ-POPKIN, BARNEY PAUL POPKIN, CARMEN P. URRUTIA, MANUEL ALVARADO, CAROLYN HACKWORTH, GLORIA HAGLER, JOHNNY RANDOLPH-KELLY, THELMA B. MANRIQUEZ, ADOLFO A. SUAREZ, NAT WASHINGTON, II, RALPH O. GOMEZ, JUAN BRITO, MARCIA ALMEDA, EMILIA TALAMANTEZ, ELLEN LEE, ESPERANZA SILVA, ANTONETTE ROMO, RONALD Q. HUERTA AND LUPE MONTANO,

Plaintiffs-Objectors-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff, Intervenor-Appellee,

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, ET AL.,

Defendants-Appellees,

ORDER

FILED: AUGUST 11, 1980

Before: CHOY and SNEED, Circuit Judges and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing enbanc and no judge of the court has voted to grant rehearingen banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX L

OFFICE OF THE CLERK

UNITED STATES DISTRICT COURT

55 EAST BROADWAY

TUCSON, ARIZONA

NOTICE OF PROPOSED SETTLEMENT

OF SCHOOL DESEGREGATION CASES

AND OF HEARING THEREON

TO: THE PARTIES, GUARDIANS AND/OR NEXT FRIENDS OF ALL BLACK STUDENTS WHO ARE ENROLLED OR ARE TO BE ENROLLED IN GRADES K THROUGH 8 IN TUCSON UNIFIED SCHOOL DISTRICT NO. 1; AND, THE PARENTS, GUARDIANS, AND/OR NEXT FRIENDS OF ALL MEXICAN-AMERICAN OR HISPANO-AMERICAN STUDENTS OR STUDENTS WITH SPANISH SURNAMES WHO ARE ENROLLED OR ARE TO BE ENROLLED IN GRADES K THROUGH 12 IN TUCSON UNIFIED SCHOOL DISTRICT NO. 1:

There are pending in the United States District Court for the District of Arizona, in Tucson, Arizona, two class actions (No. CIV 74-90 and No. CIV 74-204) charging

Tucson Unified School District No. 1, its Board of Education, its Superintendent, and certain other Defendants with violating the United States Constitution and various statutes by (in the case of Black children) racially segregating and discriminating against Black children in elementary and junior high schools, and by (in the case of Mexican-American children) racially segregating and discriminating against Mexican-American children and employees in elementary, junior high schools and high schools. These class actions were commenced in 1974 by parents of Black and Mexican-American school children in Tucson ("Plaintiffs"). The United States of America, through the United States Justice Department, was subsequently permitted to intervene as a Plaintiff. The evidence in these actions was presented to the Court between January and April of 1977, and a decision was rendered by the Court on June

5, 1978. The Court's decision, accompanied by extensive Findings of Fact and Conclusions of Law, requires the Defendants to implement by the start of the coming school year, if possible, appropriate measures to correct the existing effects of past segregation and discrimination against Black and Mexican-American children found by the Court to have been practiced by the Defendants in some elementary and junior high schools in Tucson Unified School District No. 1. The Court's decision contains no finding of segregation or discrimination in the high schools in Tucson Unified School District No. 1. In addition, the Court concluded that any issue relating to employment discrimination by Defendants was properly before the Court for consideration only insofar as it was relevant to the issues of intentional segregation of students.

The Court's decision identifies the

the following schools as having present effects of past intentionally segregative acts by the Defendants: Spring Junior High School, Safford Junior High School Brichta Elementary School, Cragin Elementary School, Jefferson Park Elementary School, Manzo Elementary School, Roosevelt Elementary School, Tully Elementary School, and University Heights Elementary School. The Court ordered the Defendants, in cooperation with the Plaintiff class representatives, to prepare a proposed plan or plans to remedy the segregation found to exist at these schools.

Following the Court's decision on June 5, 1978, Plaintiffs in these class actions filed Motions with the Court, asking that a number of additional schools be included among those found by the Court to have present effects of past intentional segregative acts by the Defendants. The Court has issued no decision with respect to

these Motions to date.

PROPOSED SETTLEMENT

On August 2, 1978, a proposed settlement of these class actions was presented to the Court jointly by the Defendants, the Plaintiff class representatives, and the Plaintiff-Intervenor United States of America. The terms of the proposed settlement are contained in a Stipulation of Settlement filed with the Court on August 11, 1978, a copy of which may be obtained at the offices of the School Board of Tucson Unified School District No. 1 Board located at 1010 East 10th Street, Tucson, Arizona. A copy of this Stipulation of Settlement is also available for examination at the office of the Clerk of the United States District Court, 55 East Broadway, Tucson, Arizona.

A general summary of the proposed settlement is as follows:

1. The nine elementary and junior high schools named hereinabove will be operated, commencing with the 1978-79 school year, in accordance with Option II of the plans submitted to the Court by Defendants on July 17, 1978 (insofar as Brichta, Manzo and Tully elementary schools are concerned), in accordance with Option III of the plans submitted to the Court by Defendants on July 17, 1978, (insofar as Cragin, Jefferson Park, Roosevelt and University Heights elementary schools are concerned), and in accordance with Option V of the plans submitted to the Court by Defendants on July 17, 1978, (insofar as Spring and Safford Junior High Schools are concerned). Copies of these plans and the Court order dated August 11, 1978, adopting a plan may be reviewed at the offices of the

School Board of Tucson Unified School District No. 1, 1010 East 10th Street, Tucson, Arizona.

2. Certain educational programs, testing procedures, instructional methods, and faculty assignment policies will be put into effect and/or reviewed by Defendants with the goal of eliminating racially or ethnically discriminatory practices.

3. Student assignment patterns at Utterback Junior High School and at Holladay and Borton elementary schools will be altered commencing with the 1979-80 school year so as to reduce the minority enrollment at these schools below approximately 50 percent minority. The procedures for the change in student assignment patterns at these schools will be developed during the 1978-80 school year through a process of public participation with review

by the Plaintiff class representatives and the United States Department of Justice.

4. Defendants will begin a process to determine whether future student assignment patterns at Davis, Drachman and Carrillo elementary schools should be changed or whether said schools should be closed, consolidated or continued. The procedures for the change in student assignment patterns, closures, consolidations, or other changes respecting these schools will be developed during the 1978-79 school year through a process of parent participation with review by the Plaintiff class representatives and the United States Department of Justice.

5. The effectiveness of the student reassignment decisions and of the changes in educational programs and related policies will be periodically

reviewed by the Court for a period of five (5) years. Therafter, the Defendants may request the Court to dissolve the Settlement Order and dismiss these class actions.

6. During the next five (5) years, the Defendants will not build new schools or additions at existing schools without authorization of the Court. Nor will Defendants during this five (5) year period engage in any acts or policies which substantially affect the racial or ethnic balance in any school in the District without Court approval.

7. The Plaintiff class representatives and the Plaintiff-Intervenor United States will not appeal any portion of the Court's decision of June 5, 1978. The Defendants shall pay to the attorneys for all the Plaintiffs the total sum of $500,000.00 for all

their attorneys' fees and costs incurred in connection with these actions.

You are reminded that the foregoing description of the proposed settlement is of a very general nature only and that the only complete statement of the terms of the proposed settlement is contained in the Stipulation of Settlement referred to above. If the settlement is approved by the Court, the agreement not to appeal the Court's decision of June 5, 1978, may be binding on members of the classes.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that a hearing will be held before the Court on Wednesday, August 30, 1978, at 8:30 a.m. at the United

States Courthouse, 55 East Broadway, Tucson, Arizona, to determine whether the proposed settlement of these class actions should be approved by the Court under Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, the settlement will be binding on all persons to whom this Notice of Proposed Settlement is directed. At the hearing on Wednesday, August 30, 1978, any person to whom this Notice of Proposed Settlement is directed may either file written objections or appear and be heard, to the extent permitted by the Court. A person who objects to the proposed settlement but who does not advise the Court of such objections at the time of hearing may be waiving such objection and any rights to raise them in

in any appeal to a higher court.

DATED this 14th day of August, 1978.

W. J. FURSTENAU, Clerk
United States District Court
District of Arizona

By /s/
Dennis C. Cole
Deputy Clerk

APPENDIX M

J. Wm. Brammer, Jr.
Richard M. Yetwin
DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.
240 North Stone Avenue
Tucson, Arizona 85701
Telephone: (602) 623-3411

Attorneys for Defendants other
that Defendant Lohr

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV 74-90-TUC-WCF CIV 74-204-TUC-WCF REPORT OF ALL DEFENDANTS OTHER THAN ANITA LOHR

MENDOZA, et al,

Plaintiffs,

UNITED STATES OF AMERICA

Plaintiff-Intervenor,

vs.

TUCSON SCHOOL DISTRICT NUMBER 1, et al,

Defendants,

FILED: August 4, 1978

W.J. Furstenau, Clerk
U.S. District Court for
the District of Arizona

/s/
Deputy Clerk

Pursuant to Order of this Court entered July 18, 1978, Defendants submit this Report to inform the Court of the activities of and proceedings before the School Board since the Defendants' Plan was submitted on July 17, 1978. Additionally, as the Court has been informally notified by letter dated August 2, 1978, the Defendants have reached a settlement of all issues with Plaintiffs Fisher, et al., Plaintiffs Mendoza, et al., and Plaintiff-Intervenor, subject to the provisions of Rule of Federal Procedure No. 23 and approval of the Court.

One of the provisions of the settlement agreement is that, with respect to the Roosevelt, University Heights, Jefferson

Park and Cragin group of schools, Option III as it is included within the materials submitted to the Court on July 17, 1978 would be agreed upon by the parties for the Court's approval. This Option is different from the one (Option II) which was adopted by the School Board as its preferred Option for this group of schools. Other than that single difference, which is agreed to by the School Board only as a part of the settlement, no alteration in the Plan as submitted on July 17, 1978 is suggested by Defendants.

Included in the materials which are submitted herewith for the Court's consideration are transcripts of two additional public meetings which the School Board held on July 20 and 31, 1978 for the purpose of receiving further citizen comment on the proposed plan alternatives and any alternate plans which the citizens may have generated. These transcripts are self-explanatory.

Also submitted in the companion materials is evidence of the Defendants' efforts to inform the residents of the School District of the School Board's proposed plan. In addition to a special issue of the TUSD News which was mailed to the parents of District children and District employees during the week of July 24, 1978, the Defendants obtained the cooperation of the two daily newspapers in Tucson with the widest circulation in publishing the Defendants' preferred plan options. Copies of the TUSD News edition and press clippings are submitted.

The Court's July 17, 1978 Order required the parties to publicly disseminate the information contained in that Order. The Defendants included the essence of the Court's July 17, 1978 Order in the TUSD News Special Edition, and presume that, since it was mailed to those affected, the terms of the Court's Order have been met.

The School Board has received nine separate communications, to date, commenting on the proposed plan filed by the Defendants. Some of these documents suggest alternative solutions to the problems identified by the Court. These are materials which have been generated by members of the public for consideration by both the School Board and the Court. These materials have been considered by the School Board and are now being transmitted to the Court for review.

One further meeting was held on August 3, 1978 at 7:30 in the evening. At this meeting, School District staff presented the Plan adopted by the School Board to 20 members of the District Council of the School-Community Partnership Council, an organization created several years ago to provide the School Board with the input and cooperative effort of the members of the public. The Council members

present are to report the substance of this meeting to the school councils in each of the District's schools so that as many citizens as are interested may be informed on the issues.

Nothing further of substance is available at this time to report to the Court, although the Defendants will endeavor to bring these materials up to date as any changes occur.

RESPECTFULLY SUBMITTED this 4 day of August, 1978.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By_____
J. Wm. Brammer, Jr.
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Defendants
other than Defendant Lohr

Copies of the foregoing
hand delivered this 4th
day of August, 1978, to:

Rubin Salter, Jr., Esq.
and William J. Maledon, Esq.
c/o Kipps & Salter
703 Transamerica Building
Tucson, Arizona 85701
Attorneys for Plaintiffs Fisher

Michael O. Zavala, Esq.
and Morris J. Baller, Esq.
c/o Bolding & Zavala
402 Toluca Building
La Placita Village
120 West Broadway
Tucson, Arizona 85701
Attorneys for Plaintiffs Mendoza

John R. Moore
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Intervenor Government

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Defendant Sutton, et al.

Armand Salese, Esq.
702 Transamerica Building
Tucson, Arizona 85701
Attorney for Alberto Sanchez,
individually

Honorable William C. Frey
Judge, U.S. District Court
U.S. Courthouse
Tucson, Arizona 85701

APPENDIX N

J. Wm. Brammer, Jr.
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Attorneys for Defendants
other than Defendant Lohr

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FISHER, et al, Plaintiffs, UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. LOHR, et al, Defendants, and SIDNEY L. SUTTON, et al, Intervenors-Defendants.	Nos. CIV-74-90-TUC-WCF CIV-72-204-TUC-WCF JOINT MOTION OF PLAINTIFF-INTEVERNOR AND DEFENDANTS OTHER THAN LOHR FOR ENTRY OF SETTLEMENT ORDER

MENDOZA, et al,

Plaintiffs,

UNITED STATES OF AMERICA

Plaintiff-Intervenor,

vs.

TUCSON SCHOOL DISTRICT NUMBER 1, et al,

Defendants,

FILED: August 11, 1978

W.J. FURSTENAU, Clerk
U.S. District Court for
the District of Arizona

By s/s
Deputy Clerk

Plaintiffs Fisher, et al., Plaintiffs Mendoza, et al., Plaintiff-Intervenor United States and Defendants other than Lohr hereby respectfully move this Court for entry of the Settlement Order, approved by the above parties, and for entry of an order, after appropriate notice under Rule 23(e), Federal Rules of Civil Procedure, approving the

Stipulation of Dismissal signed by all parties who have appeared in these actions. As grounds for this Motion the above parties state as follows:

1. On June 5, 1978, this Court entered Findings of Fact and Conclusions of Law and an Order concerning issues raised in these consolidated cases and, inter alia, directing the development of plans to eliminate any constitutional violations found by the court.

2. On June 15, 1978, Plaintiffs Fisher and Plaintiffs Mendoza each filed motions requesting this Court to alter or amend its findings, conclusions and order and the Plaintiff-Intervenor joined in those motions, which are now pending before the Court.

3. In subsequent orders, this Court has directed a schedule for the filing of plans by the Defendants, the filing of objections or alternatives by the Plaintiffs

and Plaintiff-Intervenor, the submission of suggestions by the public and the holding of a hearing thereon.

4. Since the entry of this Court's Order of June 5, 1978, the above parties have conferred and engaged in a good faith effort to resolve this case without the need for resolution by the Court of the issues pending before it or further litigation between the parties on the issues in these cases and have agreed to the terms of the Stipulation of Settlement and Settlement Order, which have been filed simultaneously with this Motion. The above parties believe that resolution of the case by the terms of the Stipulation of Settlement is in the best interest of the parties and all others concerned.

5. Plaintiffs Mendoza, et al., have agreed to dismissal with prejudice of Counts 2, 3, 4, 5, 6 and 7 of their Amended Complaint and the other parties

have determined that such dismissal, as provided in the Stipulation of Dismissal signed by all parties herein, will not prejudice their interest or the interest of any class members represented by them. All parties have agreed to the dismissal of Anita Lohr as a Defendant.

6. The above parties agree that the filing of these papers may be made in lieu of the filing of objections or alternatives by Plaintiffs and Plaintiff-Intervenor and any responses thereto by the Defendants as provided in this Court's Order of July 17, 1978.

WHEREFORE, the above parties respectfully request this Court to:

(1) Enter the Settlement Order, filed herewith and approved by the parties;

(2) Approve the Stipulation of Dismissal filed herewith after appropriate notice; and

(3) Approve the filing of these

papers as in lieu of the filings required of Plaintiffs and Plaintiff-Intervenor by this Court's Order of July 17, 1978.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
Rubin Salter, Jr.
Attorney for Plaintiffs
Fisher, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
William J. Maledon
Attorney for Plaintiffs
Fisher, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
Michael O. Zavala
Attorney for Plaintiffs
Mendoza, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
Morris J. Baller
Attorney for Plaintiffs
Mendoza, et al.

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
J. Wm. Brammer, Jr.
Attorney for Defendants
other than Defendant Lohr

RESPECTFULLY SUBMITTED this 8th day of August, 1978.

s/s
John R. Moore
Thomas M. Keeling
Louie M. Stewart
Attorneys for Plaintiff-
Intervenor United States
of America

APPENDIX O

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members or the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include

and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to present undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders

may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX P

CODE OF PROFESSIONAL RESPONSIBILITY

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

ETHICAL CONSIDERATIONS

ED5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

INTERESTS OF A LAWYER THAT MAY AFFECT HIS JUDGMENT.

EC 5-2. A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

DISCIPLINARY RULES

DR 5-103. Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

ETHICAL CONSIDERATION

EC 7-9. In the exercise of his professional judgment on those decisions which are for his

determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

DISCIPLINARY RULES

DR 7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonable available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

APPENDIX Q

Law Offices

MARTORI, MEYER, HENDRICKS & VICTOR

A Professional Association

July 7, 1978

J. William Brammer, Jr., Esquire
Richard M. Yetwin, Esquire
DeCONCINI, McDONALD, BRAMMER
& YETWIN, P.C.
240 North Stone
Tufson, Arizona 85701

Re: Tucson School Desegregation
Case/Settlement Matters

Dear Bill and Dick:

This letter is in response to your request that, in connection with the possible settlement of the remaining issues in this matter, the plaintiffs detail for you the amount of attorneys' fees and costs that they seek to have paid by the School District as a part of the settlement. This letter, however, relates only to the attorneys for the Fisher plaintiffs (No. C-74-90). It is my understanding that Mike Savala will be submitting to you today a similar letter on behalf of the attorneys for the Mendoza plaintiffs (No. C-74-204).

As a preliminary matter, let me point out that Rubin and I spent considerable time last night and again this morning reviewing time records and out-of-pocket costs. Taking into consideration some of

of the points that the two of you made to us several weeks ago concerning travel time, alleged duplication, and arguably unnecessary efforts, Rubin and I agreed that each of our law firms would delete several hundred hours from the total hours recorded in connection with this litigation. At the same time, Rubin and I agreed that, for purposes of this settlement discussion only, we would charge the remaining hours at a significantly reduced hourly rate with no added factors or multipliers for the inherent risks of the litigation and for the long period of time over which the litigation was carried by our two firms.

Rubin and I have concluded that the following is a reasonable proposal on behalf of the Fisher plaintiffs for payment of fees and costs by the School District in settlement of this litigation:

FEES: Between our firm and Rubin's firm, exclusive of the above-referenced hours that have been intentionally disregarded, there is a combined total of 6,388 hours of attorney time since the inception of this litigation. In addition, our two firms have a combined total of 2,413 hours of paralegal and law clerk time. (During the bulk of the time, the "law clerks" in question were law school graduates or lawyers admitted to the Bar.) We have applied a rate of $55.00 per hour to the attorneys' time and a rate of $15.00 per hour to the paralegal and law clerk time. This results in a total requested fee of $387,535.00

COSTS: After eliminating some out-of-pocket costs on the grounds that they were

of questionable recovery at best, Rubin and I added together the out-of-pocket costs of our two law firms since the inception of the litigation for such items as depositions, witness fees, expert fees, reproduction and copying, service of process, necessary travel and related expenses, equipment and supplies, miscellaneous unvouchered costs. The total of these out-of-pocket costs, for which we seek reimbursement from the School District is $104,381.52.

I think that it is appropriate to make two brief points concerning the foregoing. First, although you have raised some question concerning the reasonable value of Larry Hammond's time in light of his relative inexperience as a trial attorney, we believe (without necessarily agreeing with your position) that the requested rate of $55.00 an hour for all attorneys involved is unquestionably reasonable and more than offsets any arguments that you may have concerning the value of Larry's time. Second, although we do not necessarily agree with your arguments concerning unnecessary duplication and excessive travel time, we have (for purposes of this settlement proposal only) taken these factors into consideration in connection with both our total hours claimed and our hourly rate requested.

Needless to say, this letter and the figures contained herein are being submitted to you as part of a settlement proposal only. In the event that we are unable to arrive at a settlement of this matter, this letter is not deemed a waiver of our right to seek from the court

compensation for all hours expended at normal hourly rates of $65.00 to $85.00 per hour, together with appropriate multipliers for the risk and contingency factors, plus all out-of-pocket costs. Please let me know if you would like any further information concerning any of the foregoing.

Very truly yours,

/s/

William J. Maledon

WJM/cap

APPENDIX R

LAW OFFICES

BOLDING & ZAVALA

July 12, 1978

J. William Brammer, Jr., Esq.
DeConcini, McDonald, Brammer &
Yetwin, P.C.
240 North Stone
Tucson, Arizona 85701

Re: Desegregation Case Settlement.

Dear Mr. Brammer:

This letter is in response to your request that we submit to you our requested attorney's fees and costs in this case. As was done by the Fisher plaintiffs, we have reviewed our time records and out-of-pocket expenses to date. Taking into consideration that the District should not be charged for unnecessary duplication, the hours submitted to you here do not represent all of the hours spent by attorneys in this case. Also, the expenses of law clerks is included as costs and does not involve any profit to us. The figures represent the amounts actually paid by us for law clerks and, for settlement purposes only, we are seeking only to be reimbursed for those expenses.

Including the time spent by attorneys for MALDEF and this firm, the total attorney hours spent in the case for settlement purposes amount to 3,741. Unlike the Fisher plaintiffs, we are not setting any hourly rate at this time. Our total out-of-pocket expenses to date amount to $34,957.28.

As stated by the Fisher plaintiffs, this letter and the figures contained herein are submitted to you as part of a settlement proposal only. In the event we are unable to arrive at a settlement of this case, this letter is not to be deemed a waiver of our right to seek from the court compensation for all hours expended at the rates set by the court. If any additional information is needed, please feel free to call.

Sincerely,

BOLDING & ZAVALA

/s/
Michael O. Zavala

MOZ:amy
cc: Rubin Salter, Esq.

APPENDIX S

DeCONCINI McDONALD BRAMMER
& YETWIN, P.C.
Attorneys at Law

July 13, 1978

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Re: Fisher v. Lohr
No. CIV-74-90-TUC-WCF
Mendoza v. District No. 1
No. CIV-74-204-TUC-WCF

Gentlemen:

This letter is written to Messrs. Salter and Maledon as Counsel for Plaintiffs Fisher, et al, and all members of the class of Plaintiffs represented by the Fishers, et al, to Messrs. Zavala and Baller as Counsel for Plaintiffs Mendoza, et al, and all members of the class of Plaintiffs represented by Maria Mendoza, et al, to Messrs. Keeling, Stewart and Moore as Counsel for Plaintiff Intervenor, the Government of the United States of America, in response to the suggestions made by you, on behalf of your clients, that the above-captioned cause might be settled.

Specific elements for settlement have been communicated to me from Counsel for Fishers, et al, Mendoza, et al, concurred in by Counsel for the Government. These elements, it is my understanding, must be considered together with and in addition to the plan being submitted on July 17, 1978, by me, on behalf of my clients, as I understand them to have been proposed by the respective Plaintiffs' counsel, are as follows:

A. Respecting Plaintiffs Fisher, et al:

1. "Desegregation" of Borton and Holladay Elementary Schools.

2. Change in some fashion the pattern of elementary schools which "feed" their graduates into Utterback Junior High School.

3. With respect to Pueblo Gardens and Cavett Elementary Schools, either change the junior high school into which graduates are fed, or restructure the assignment of faculty to those schools so that not more than one Black teacher is on the faculty of either school.

4. Examine carefully, with a view toward improvement if necessary, testing instruments used by the District, as well as the Board's suspension and expulsion policy and its counseling program within the schools.

5. Consideration of the necessary in-service programs to reinforce the cultural awareness of District employees involved in the desegregation efforts, as well as examining the District's educational programs to determine the cultural diversity within the offerings, leading toward any necessary improvement in curricular offerings.

6. Consideration of adopting an affirmative-action or non-discrimination statement.

7. Examination of the District's personnel practices concerning hiring, placement and promotion.

8. Elimination within District schools of any concentration of Black employees.

9. Examination and improvement, if necessary, of the educational offerings respecting the basic skills of reading, writing and mathematics.

10. A determination of whether the existence of bilingual, English-Spanish program in schools adversely affects students who attend those schools but do not need the programs.

11. Consideration of the June 1978 "Programmatic Recommendations to Assist in the Quality Education of Black Students in Tucson" which I received from Mr. Salter on June 29, 1978, and which includes discussion of portions of the subject matter of Items #4, 5, 6, 7 and 9.

B. Respecting Plaintiffs Mendoza, et al:

1. Examination of Drachman, Carrillo, and Davis Elementary Schools with a view toward replacing them with a new, downtown school which will better allow the District to deliver educational services and an equal education opportunity to the students presently served by those three schools.

2. Examination and possible development of clear policies respecting promotion within the District's certificated job classifications.

3. Consideration, and adoption if necessary, of a specific reading program proposal which I received from Mr. Zavala on July 7, 1978, concerning the "Spalding" method of instruction.

C. Respecting both Plaintiffs Fisher, et al, and Mendoza, et al, agreement upon a sum certain to be paid by my clients to counsel for all Plaintiffs as and for their attorney's fees and costs incurred in the above-captioned causes.

D. In return for the above-enumerated items, and as express conditions for them, all Plaintiffs, both those specifically named and all class members, and the Plaintiff-Intervenor, must agree as follows:

1. Not to appeal or otherwise move to alter or amend in any way any order entered on or after June 5, 1978, in the above-captioned causes.

2. That on or before Jul7 1, 1983, assuming that my clients have theretofore complied with the reasonable reporting procedures required by the Court, my clients may apply to the Court having jurisdiction of the above-captioned causes, and that no opposition to such application would be made by

any plaintiffs, either those specifically named or any class member, or Plaintiff-Intervenor, for an order of the Court terminating and dismissing with prejudice the above-captioned causes as to all Defendants, releasing all Defendants from any further responsibility to Plaintiffs, both those specifically named and all class members, or Plaintiff-Intervenor based upon the orders of the Court theretofore made, and terminating finally and with prejudice any further jurisdiction of the Court over any and all Defendants in the above-captioned causes. In addition, the Defendants cannot be responsible for changes subsequent to the implementation of any portion of the plan in 1978 or thereafter of the racial and ethnic balance within the schools, when those changes are due to factors over which the District has no control, such as residential patterns or student exodus from the school system.

3. Stipulating to judgment in favor of all Defendants, and against all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor, on Counts 2, 5 and 6 of the Amended Complaint filed by and on behalf of Plaintiffs Mendoza, et al, which have been heretofore severed by the Court.

4. Stipulating that the motions heretofore filed by all Plaintiffs,

both those specifically named and all class members, and Plaintiff Intervenor, to alter, amend, supplement or make additional Findings of Fact and Conclusions of Law are moot and that the same be dismissed by the Court as moot.

5. That all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor will make no objections to, or suggested revisions of, the plan which will be submitted July 17, 1978 in response to the Court's June 5, 1978 Order.

6. Stipulation by all parties that any order entered in conjunction with paragraph D 2 be considered as fully and finally terminating and resolving any and all disputes which were or could have been raised between the parties, including all class members, in the above-captioned causes.

Based upon the foregoing elements expressed by all Plaintiffs for a complete and full settlement, and the required reciprocal agreements on the part of all Plaintiffs, this letter signifies the intent of my clients, pursuant to action taken by the Board of Education of Unified School District #1, Pima County, Arizona, on July 13, 1978, to settle finally and fully any and all disputes which were or could have been raised in the above-captioned causes between the parties, including all class members, as follows:

A. As to Plaintiffs Fisher's, et al, requests:

1. The student assignment patterns for Borton and Holladay Elementary Schools will be altered. The Board, however, does not want to limit itself to the options which have previously been shown to them and you. Although one of those options may ultimately be chosen, the Board does not wish to unilaterally impose an option upon unsuspecting parents and children in a settlement. Instead, the Board would establish a means by which the public will be informed of and involved in what result must be reached, and allow the public to advise the Board as to how the result should be reached

   The Board will immediately implement this process with a view toward having an option with respect to both Borton and Holladay ready for its review and action. The Board further envisions that a review by Counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with constitutional principles.

   Should the Board's public process not produce a result satisfactory to either the Board or Plaintiffs, the Board will, on or before December 31, 1978, independently examine the issues and produce a plan for presentation to the Court

for its approval prusuant to paragraphs 5 and 7 of the Court's June 5, 1978 Order. Implementation of this student assignment adjustment would be targeted for the fall semester of the 1979-80 school year, subject to adjustments thereafter with Court approval.

2. Respecting the alteration of Utterback's attendance patterns, the Defendants agree that those patterns will be modified. Again, as with Borton and Holladay, the Board will utilize the advice of the public when reaching its decision. The process, timetable and procedures here would be the same as indicated in paragraph A 1.

3. Your concern regarding Pueblo Gardens and Cavett will be examined, particularly with respect to the propriety and reasonableness of Black teachers assigned to those schools. The Council of Black Educators will be involved in this assessment process and if it is determined that some reassignment of personnel is required, the Board will make the necessary adjustments, subject to the approval of the Court.

4. The District has recently adopted a uniform suspension and expulsion policy and administrative procedures to implement the policy. Copies are attached for your review, as I believe that your concerns have been adequately

addressed. Respecting your concerns relating to student evaluation and counseling procedures and techniques, the District agrees to continue its efforts to reinforce that no student will be discriminated against in this aspect of the District's educational program.

5. There will be in-service training of District employees involved in implementing the plan ordered by the Court, as well as any commitments made herein. Planning for this effort will be undertaken by District staff as soon as the Court approves each element of the plan and this understanding, and thereafter implemented as appropriate.

   In this regard, please see Dr. Florence Reynolds 6/30/78 and 7/10/78 memoranda. These memoranda also address your curricular concerns.

6. Please see a copy of a draft of a statement regarding non-discrimination in employment which the Board would adopt as a part of this settlement.

7. Contained within the proposed non-discrimination statement is a commitment to establish uniform procedures to address your concerns in these areas.

8. Although a concern has been expressed by you that Black teachers not be assigned in such a manner

as to isolate them by themselves, as a practical matter this should not be a problem. Assignment of Black teachers in all schools will be assessed during the 1978-79 school year. The Council of Black Educators will be involved in this process and if this examination indicates that reassignment of Black faculty is suggested, the Board will undertake such reassignment beginning in the 1979-80 school year.

9. Please refer, in response to those concerns, to Dr. Reynolds' memoranda dated 6/30/78 and 7/10/78.

10. It is the District's position that a child is not admitted to a bilingual instructional program without specific parental permission. Accordingly, the District must presume that any child in such a program must need it. However, an examination of your concern will be conducted and if any adverse affects are found respecting non-program students, they will certainly be addressed.

11. Again, Dr. Reynolds' memoranda of 6/30/78 and 7/10/78 briefly discuss the District's position and commitment respecting the concerns and proposals contained in the June 1978 document you presented to me. I have been assured by District staff, and the Board has so directed by authorizing this letter, that the legitimate concerns contained in that document will be addressed within the

District's total effort.

B. As to Plaintiffs Mendoza's et al, requests:

1. The student assignment patterns for Davis, Carrillo and Drachman Elementary Schools will be altered, and the Board is quite concerned with the manner in which any change in the assignment of students now attending Davis, Drachman, and Carrillo Elementary is to be handled. Accordingly, the Board wants to significantly involve citizens in any process which may result in any school closing or the reassignment of any pupils by permitting them to offer advice to the Board before any decision is made to close, consolidate, or continue to operate these schools and also offer the Board advice on the educational specifications of any new elementary school to be built in the inner city if such is to be the case.

   The Board will immediately implement this process with a view toward having an option ready with respect to these schools for its review and action. The Board further envisions that a review by Counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with consitutional principles.

Should the Board's public process not produce a result satisfactory to either the Board of Plaintiffs, the Board will, on or before December 31, 1978, independently examine the issues and produce a plan for presentation to the Court for its approval pursuant to paragraphs 5 and 7 of the Court's Order of June 5, 1978.

2. Please refer to the attached proposed statement regarding nondiscrimination in employment. Contained within this document is a commitment to address the concern which you have raised.

3. Please refer to the attached District memorandum dated July 12, 1978, in response to this item, as well as the attached analysis of this program authored by Laura Banks.

As a result of these two memoranda, the District has a significant question respecting the advantage, if any, to students exposed to this program. However, if the parents of at least 25, but not more than 30 children, with full knowledge of the limitations of this program, remain interested in enrolling their children in this program, the District will offer such a pilot program. These volunteers must be available and signify in writing their intentions, including an acknowledgement of the program's limitations, by August 1, 1978, in order to

implement the program in the 1978-79 school year.

The District will provide a teacher for this program who is fully competent to instruct the "Spalding Method". However, that teacher will not necessarily be the person suggested by Counsel for Plaintiffs Mendoza, et al, but rather the teacher who is deemed by District personnel to be most competent to the task.

C. A letter dated July 7, 1978, addressing the attorneys' fees and costs issue, has been received by me from counsel for Plaintiffs Fisher, as applied only to them. I have also received a letter dated July 12, 1978 from counsel for Plaintiffs Mendoza, et al., which applies to them. This issue has been addressed by my clients and they have instructed me to tell you that the District will pay to all counsel for all Plaintiffs as and for all their attorneys' fees and costs, both past and future, the aggregate sum of $400,000.00 to be divided among them in any manner they see fit.

D. I solicit any comment which any of you may have with respect to the foregoing, and would appreciate it if you would please offer any comments in writing. In addition, I will require a written letter of intent from all counsel for Plaintiffs both those specifically named and all class members, and Plaintiff-Intervenor that the six requirements of settlement made by my clients herein are satisfactory and will be agreed to, providing my clients

adhere to the commitments it is suggested herein will be made by them.

I look forward to hearing from all of you soon.

Very truly yours,

DeCONCINI McDONALD BRAMMER
& YETWIN, P.C.

/s/
J. Wm. Brammer, Jr.

JWB:jo
Enclosures
cc: Edmund Kahn
Dr. Wilbur H. Lewis
Russell N. Jensen

APPENDIX T

LAW OFFICES

MARTORI, MEYER, HENDRICKS & VICTOR

A PROFESSIONAL ASSOCIATION

July 19, 1978

J. William Brammer, Jr., Esquire
DeCONCINI, McDONALD, BRAMMER
& YETWIN, P.C.
240 North Stone Avenue
Tucson, Arizona 85701

Re: Fisher v. Lohr, et al
No. CIV 74-90-TUC-WCF

Dear Bill:

On behalf of the Fisher plaintiffs, we hereby submit to you certain comments and requested changes with respect to the settlement proposal contained in your letter of July 13, 1978, to all plaintiffs' counsel. In addition, we hereby submit to you our tentative comments, objections, and suggested alternatives concerning the plan of desegregation that the Board has recommended to the Court with respect to the nine schools that Judge Frey has ordered desegregated.

As you know, this letter is merely preliminary to our scheduled meeting on August 1 to discuss the specifics of an initial stipulation of settlement. Some of the changes suggested herein will have to be refined somewhat, but this letter should give you some idea of our current

thinking. Suffice it to say that we have every reason to believe that the specifics of a stipulation or stipulations can be worked out if the general parameters of a settlement can be agreed to in principle.

RESPONSE TO LETTER OF JULY 13, 1978

For the sake of clarity and simplicity, we have inserted our comments and requested changes into the affected portions of your July 13 letter, a copy of which is attached hereto. Obviously, many of the changes that we have requested in your July 13 letter are for purposes of clarification only and do not indicate a difference of opinion as to the underlying substantive issues. To the extent that our requested changes do relate to substantive issues, we do not believe that our requests are unreasonable or outside the scope of a good faith effort to settle this matter without further litigation and expense.

Specifically, the purposes of our requested changes are as follows. The changes on page two of your letter are for clarification purposes only.

The changes on page three of your letter (see insert following your page three) are designed to address to some extent the concerns that we discussed with you on the phone on Monday. The language that we have suggested in this regard is, we believe, consistent with the intent of our proposed agreement.

The changes on page four of your letter are self explanatory, and do not in our opinion, reflect any significant departure from what you had proposed.

The changes on pages five, six and seven of your letter are for purposes of both clarification and specificity. These twelve numbered paragraphs will become the essence of our initial stipulation with defendants. Accordingly, we must have some greater specificity as to what defendants are willing to do, even though we fully realize that defendants cannot agree to specifics at this time because of the need for further community input concerning the available alternatives. For example, we do not believe that it is sufficiently specific for defendants to state merely that "the student assignment patterns for Borton and Holladay elementary schools will be altered." Such a statement, by itself, would technically permit the School Board to do nothing more than alter the attendance zones for Borton and Holladay by moving them a block or two in either direction without thereby having any significant impact on the racial and ethnic composition of the student enrollment at those schools. The language we have inserted at the end of the above-quoted sentence is designed merely to clarify the commitment that the School Board would make with respect to these schools as a part of the proposed settlement. The language in the remaining paragraphs on pages five, six and seven of your letter of July 13, 1978, is likewise designed to clarify and to bring greater specificity to the general commitment of the parties under the settlement proposal. We do not believe that any of these suggested changes results in a substantive alteration of what has been proposed by you and previously discussed with us, but we would be pleased to discuss the matter with you further if you do not agree with this position.

With respect to attorney fees and costs (see proposed changes on page eight of your letter of July 13, 1978), we would like to state at the outset that we do not believe that a disagreement on these matters should preclude a settlement. However, we do not feel that we could live with your current offer of $400,000 for all plaintiffs. As we pointed out in our letter to you of July 7, 1978, we had already substantially reduced our total hours on behalf of the Fisher plaintiffs in arriving at the proposed figure (for us alone) of $491,916.52. The considerable out-of-pocket costs involved and the large number of hours and costs claimed by the attorneys for the Mexican-American plaintiffs leave little room for recovery of any reasonable attorney's fees by us. Much of the expense of this litigation was financed by loans and temporary cost advances received by our two law firms (i.e., Kipps & Salter and Martori, Meyer, Hendricks & Victor). Under all of these circumstances, we do not believe that our counterproposal that the District pay $550,000 in fees and costs to all plaintiffs' attorneys is unreasonable. As pointed out above, however, we do not believe that this issue should preclude a settlement. Thus, if the Board is unwilling to reconsider its $400,000 offer, we suggest that a viable alternative might be to divorce this issue from our current settlement discussions and submit the issue of recovery of attorneys' fees and costs to Judge Frey under traditional recovery principles in cases such as this.

We recognize that your letter of July 13, 1978, is a sincere effort on defendants' part to pursue a good faith settlement of

this litigation. Presumably, defendants have likewise recognized that plaintiffs have made and are continuing to make every diligent and good faith effort to arrive at a settlement of this litigation. As you know, plaintiffs have made a number of substantial concessions in the course of the settlement discussions, and defendants no doubt feel that they have made some substantial concessions also. We believe that the basic elements of an agreement in principle are contained in your letter of July 13 with the addition of the changes that we have requested. We are hopeful that the settlement efforts will not stall at this point and we therefore look forward to a favorable response from you with respect to our requested changes in your July 13 letter.

PROPOSED PLAN OF DESEGREGATION

With respect to defendants' proposed plan of desegregation for the nine elementary and junior high schools which are the subject to Judge Frey's Order of June 5, 1978, our position is as follows:

1. With respect to defendants' recommendation concerning the Brichta-Manzo-Tully complex, we have no objection or sugtested alternatives and we are prepared to abide by this recommendation even though we do not necessarily agree that this option effectively desegregates these three schools.

2. With respect to defendants' recommendation concerning Spring and Safford Junior High Schools, we have no objections or suggested alternatives and we are prepared to abide by this recommendation on

the understanding that the measures taken are a preliminary step to the eventual closure of Safford and Mansfield Junior High Schools and the building of a new junior high school in that area to replace them.

3. With respect to defendants' recommendation concerning Roosevelt-University Heights-Jefferson Park-Cragin, we do have certain objections and suggested alternatives to present. Essentially, it is our position that defendants' recommendation with respect to these schools (i.e., known as Option II) unfairly and improperly places the burden of desegregation solely on the minority students. Indeed, defendants' proposed plan would bus minority students from the former Roosevelt attendance zone to Blenman and Cragin whole Anglo students in the Foothills area north of the Rillito River (who were previously bussed to Cragin and Jefferson Park) are to be transported to two predominately Anglo schools (i.e., Davidson and Whitmore). In addition, the defendants' proposed plan contains no indication as to what the long-range solution is for the Roosevelt-University Heights-Jefferson Park area. Presumably, any plan such as that proposed by the District should be accompanied by specific projections for the construction of new schools and the closing of existing schools so as to maintain desegregative gains and at the same time eliminate as much of the proposed transportation of students as possible. In light of these objections to and the apparent shortcomings in defendants' proposed plan with respect to these schools, we suggest (for sake of settlement purposes) the following alternatives:

A. Adoption by the Board of the option originally recommended to the Board by the District Staff. This option, as we recall, has the added advantage of producing a somewhat greater degree of desegregation of the schools identified by the Court as being unconstitutionally segregated, without placing the burden of desegregation solely on the minority students. As pointed above with respect to the District's current proposal, however, we believe that even this option must be accompanied by some specific projections for the construction of new schools and for the eventual reduction of the student transportation called for by the plan.

B. Alternatively, we suggest that the Board adopt a plan whereby Roskruge Elementary School becomes the focal point for the desegregation of the Roosevelt-University Heights-Jefferson Park-Cragin complex. This could be done, we believe, by (1) closing Roosevelt and University Heights, (2) increasing the Roskruge attendance zone to include all or some of the former Roosevelt zone (possibly that portion south of Speedway) and all of the former University Heights zone south of Elm Street, (3) transporting the former Jefferson Park Foothill students and the former Cragin Foothill students to Roskruge, (4) assigning the former Roosevelt students north of Speedway to Jefferson Park, and (5) assigning the former University Heights students north of Elm to Jefferson Park. The use of Roskruge in this manner would significantly reduce the number of students

who would have to be bussed who are not already being bussed to a similar extent. At the same time, the burden of desegregation would not rest solely with the minority students. This plan is perfectly consistent with the more long range goals of construction of a new shcool in the Foothills area as well as the contstruction of a new school in the Roskruge-Richey-Roosevelt-University Heights area which would be designed to maintain desegregative advances in that area of the city.

CONCLUSION

Consistent with our continued efforts and hope to arrive at an amicalbe settlement of this litigation, we are prepared to discuss any of the foregoing matters with you in greater detail, and will plan to do so at the August 1 meeting. If we are unable to arrive at a settlement of this matter, this letter is not to be deemed a waiver, either in whole or in part, of our rights to object to defendants' proposed plan or plans of desegregation, or to pursue any other rights and remedies that may be available to us. Moreover, since this letter is submitted to you as part of a settlement proposal, we would request that it not be made available to nor discussed with the press or the public without our consent.

We shall await your reply on or before August 1, 1978.

Very truly yours,

KIPPS & SALTER

BY/s/
RUBIN SALTER, JR., ESQUIRE

MARTORI, MEYER, HENDRICKS & VICTOR
A Professional Association

BY/s/
WILLIAM J. MALEDON, ESQUIRE

WJM/cap
Encl.

APPENDIX U

DeCONCINI McDONALD BRAMMER & YETWIN, P.C.
ATTORNEYS AT LAW
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July 26, 1978

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Re: Fisher v. Lohr
No. CIV-74-90-TUC-WCF
Mendoza v. District No. 1
No. CIV-74-204-TUC-WCF

Gentlemen:

This letter is written to Mr. Salter and Mr. Maledon as counsel for Plaintiffs Fisher, et al, and all members of the class represented by the Fishers, et al; to Mr. Zavala and Mr. Baller as counsel for Plaintiffs Mendoza, et al, and all members of the class of Plaintiffs represented by Maria Mendoza, et al; and to Mr. Keeling, Mr. Stewart and Mr. Moore as counsel for Plaintiff-Intervenor, the Government of the United States of America in reply to the response to our letter dated July 13, 1978, which was sent by the Plaintiffs; Fisher attorneys on July 19, 1978; by the Plaintiffs Mendoza's attorney on July 19, 1978; and by the Plaintiff-Intervenor's attorneys on July 20, 1978.

In order to facilitate a response to all of you this letter shall first reply to Plaintiffs' Fisher attorneys and shall begin with those materials found on page 4 of their letter under the subheading "Proposed Plan of Desegregation". Subsequent to making several comments which deal specifically with the plan for desegregation, this letter will reply to the suggestions made in Plaintiffs' Fisher responsive letter. In order to simplify the Board's reply to that response, we have taken Mr.

Brammer's July 13, 1978 letter and had it retyped including additions made by Plaintiffs which have been approved by the Board, paragraphs which were changed by the Plaintiffs but which the Board feels compelled not to change. Immediately following the retyped text of the July 13, 1978 letter will be a short memorandum which points out the changes made in the agreement by page and paragraph designation. The page and paragraph designation will be followed by one of the four statements below which explain the action taken by the Board:

1. Adopted as modified by Plaintiffs - this means that Plaintiffs' modification or the original July 13, 1978 letter has been adopted by Board action taken July 26, 1978.

2. Partially adopted as modified by Plaintiffs - this means that a part, but not all, of the requested modification has been accepted by the Board.

3. Unchanged in original - this means that the Plaintiffs did not change the original proposal letter and it has remained unchanged and has been retyped.

4. Modifications by Plaintiffs rejected, original language readopted - this means that the Board has rejected the proposed modification by Plaintiffs and has readopted the language of its original letter.

In the appropriate place after each of the above statements, some idea as to the Board's rationale will be stated, if

necessary, in rejecting or partially adopting the proposals by Plaintiffs.

PROPOSED PLAN OF DESEGREGATION

The Board is not in a position to consider the utilization of Roskruge Elementary as a focal point for the desegregation of the Roosevelt-University Heights-Jefferson Park-Cragin complex. As the Plaintiffs know, Roskruge is a very old school which is multi-storied and will be most difficult to modify to comply with the Rehabilitation Act of 1973 or the various architectural control acts which are now in effect and require elementary schools to be accessible to handicapped children.

The Board has, however, stated that it will, for settlement purposes only, rescind its vote taken on July 12, 1978 which adopted Option 3, as amended (which was, in effect, the proposed Option 2) and would be willing to adopt the original Option 3 without an amendment. The following copy of the July 13, 1978 letter, as modified, will still make reference to the July 17, 1978 plan as presented by the Board. If a settlement is reached, this paragraph will control. (See page 7, paragraph D 6.)

However, with respect to Option 3, the Board will not accompany that proposal by a specific projection for the contruction of a new school or for the eventual reduction of the student transportation called for by the plan. Any student transportation in this area has been prompted by and is a result of the lawsuit, and there is a possibility that the students involved could be transported indefinitely. This is a case with many students in the District at the present time, including the children referred

to in your letter as the foothills students. It should be apparent to you that the construction of a new school in the same area, without significant demographic changes, would be constructed as a racially imbalanced school

THE JULY 13, 1978 LETTER, AS MODIFIED

This letter is written to Messrs. Salter and Maledon as counsel for Plaintiffs Fisher, et al, and all members of the class of Plaintiffs represented by the Fishers, et al, to Messrs. Zavala and Baller as counsel for Plaintiffs Mendoza, et al, and all members of the class of Plaintiffs represented by Maria Mendoza, et al, to Messrs. Keeling, Stewart and Moore as counsel for Plaintiff-Intervenor, the Government of the United States of America, in response to the suggestions made by you, on behalf of your clients, that the above-captioned causes might be settled.

Specific elements for settlement have been communicated to me from counsel for Fisher, et al, Mendoza, et al, concurred in by counsel for the Government. These elements, it is my understanding, must be considered together with and in addition to the plan being submitted on July 17, 1978, by me, on behalf of my clients, to the Court pursuant to its order of June 5, 1978. These elements, as I understand them to have been proposed by the respective Plaintiffs' counsel, are as follows:

A. Respecting Plaintiffs Fisher, et al:

1. "Desegregation of Borton and Holladay Elementary Schools.

2. Change in some fashion the pattern of elementary schools which "feed" their graduates into Utterback Junior High School.

3. With respect to Pueblo Gardens and Cavett Elementary Schools, either change the junior high school into which the graduates are fed, or restructure the assignment of faculty to those schools so that a disproportionate number of Black teachers (taking the District as a whole) are not on the faculty of either school.

4. Examine carefully, with a view toward improvement if necessary, testing instruments used by the District, as well as the Board's suspension and expulsion policy and its counseling program within the schools.

5. Consideration of the necessary in-service programs to reinforce the cultural awareness of District employees involved in the desegregation efforts, as well as examining the District's educational programs to determine the cultural diversity within the offerings, leading toward any necessary improvement in curricular offerings.

6. Consideration of adopting an affirmative-action or non-discrimination statement.

7. Examination of the District's personnel practices concerning hiring, placement and promotion.

8. Elimination within District schools of any concentration of Black employees.

9. Examination and improvement, if necessary, of the educational offerings respecting the basic skills of reading, writing and mathematics.

10. A determination of whether the existence of bilingual English-Spanish programs in schools adversely affects students who attend those schools but do not need the programs.

11. Consideration of the June 1978 "Programmatic Recommendations to Assist in the Quality Education of Black Students in Tucson" which I received from Mr. Salter on June 29, 1978, and which includes discussion of portions of the subject matter of Items #4, 5, 6 7 and 9.

B. Respecting Plaintiffs Mendoza, et al:

1. Examination of Drachman, Carrillo, and Davis Elementary Schools with a view toward replacing them with a new, downtown school which will better allow the District to deliver educational services and an equal educational opportunity to the students presently served by these three schools.

2. Examination and possible development of clear policies respecting promotion within the District's certificated job classifications.

3. Consideration, and adoption if necessary, of a specific reading program proposal which I received from Mr. Zavala on July 7, 1978, concerning the "Spalding" method of instruction.

C. Respecting both Plaintiffs Fisher, et al., and Mendoza, et al, agreement upon a sum certain to be paid by my clients to counsel for all Plaintiffs as and for their attorneys' fees and costs incurred in the above-captioned causes.

D. In return for the above-enumerated items, and as express conditions for them, all named Plaintiffs, both on their own behalf and on behalf of all class members, and the Plaintiff-Intervenor must agree as follows:

1. That they will enter into an initial stipulation with Defendants containing essentially the same terms and conditions as set forth in this letter, which stipulation shall then be submitted to the Court for its approval in the form of an Order, enforceable by Plaintiffs and Defendants.

2. That, following the completion of the procedures set forth in paragraphs A 1 through A 3 and in paragraph B 1, following in this letter, they will enter into a

second stipulation with Defendants concerning the specifics of the plan called for by such paragraphs, which second stipulation shall be then submitted to the Court for its approval in the form of an Order, enforceable by Plaintiffs and Defendants.

3. That they will not appeal or move to alter or amend in any way the Court's Order of June 5, 1978, unless the Defendants fail to enter into or the Court fails to approve the stipulation called for in paragraph D 1 above, and until such stipulation has been entered into and approved by the Court, the Motions to Alter or Amend filed by Plaintiffs on June 15, 1978, shall remain under consideration by the Court without any ruling thereon so as to preserve Plaintiffs' rights under said Motions. Once said stipulation has been entered into and approved by the Court in a formal Order, the Motions to Alter or Amend filed by Plaintiffs on June 15, 1978, shall be deemed denied as moot. Notwithstanding any of the foregoing to the contrary, Plaintiffs and Defendants shall retain all rights and remedies provided by law or equity with respect to the stipulations referred to in paragraphs D 1 and D 2, above, including the right of appeal to a higher court concerning any Order of the District Court which refuses to enforce the Orders issued pursuant to such

stipulations. Any Orders issued by Judge Frey which enforce any Orders issued pursuant to these stipulations will not be appealable.

4. That on or before July 1, 1983, assuming that Defendants have theretofore complied with the stipulations and orders entered in the above-captioned causes and have complied with the reasonable reporting procedures required by the Court, my clients may apply, upon 30 days written notice to Plaintiffs, to the Court having jurisdiction over the above-captioned causes, and that no opposition to such application would be made by any Plaintiffs, either those specifically named or any class member, or Plaintiff-Intervenor, for an order of the Court terminating and dismissing with prejudice the above-captioned causes as to all Defendants, releasing all Defendants from any further responsibility to Plaintiffs, both those specifically named and all class members, or Plaintiff-Intervenor based upon the orders of the Court theretofore made, and terminating finally and with prejudice any further jurisdiction of the Court over any and all Defendants in the above-captioned causes. In addition, the Defendants cannot be responsible for changes subsequent to the implementation of any portion of the plan in 1978 or thereafter of the racial or ethnic

balance within the schools, when those changes are due to factors over which the District has no control, such as residential patterns or student exodus from the school system.

5. Stipulating to judgment in favor of all Defendants, and against all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor, on Counts 2, 5 and 6 of the Amended Complaint filed by and on behalf of Plaintiffs Mendoza, et al, which have been heretofore severed by the Court.

6. That all Plaintiffs, both those specifically named and all class members, and Plaintiff-Intervenor will make no objections to, or suggested revisions of, the plan which was submitted July 17, 1978 in response to the Court's June 5, 1978 Order.

7. Stipulation by all parties that any order entered in conjunction with paragraph D 4 be considered as fully and finally terminating and resolving any and all disputes which were or could have been raised between the parties, including all class members, in the above-captioned causes.

Based upon the foregoing elements expressed by all Plaintiffs for a complete and full settlement, and the required reciprocal agreements on the part of all Plaintiffs, this letter signifies the

intent of my clients, pursuant to action taken by the Board of Education of Unified School District #1, Pima County, Arizona on July 13 and 26, 1978, to settle finally and fully any and all disputes which were or could have been raised in the above-captioned causes between the parties, including all class members, as follows:

A. As to Plaintiffs' Fisher, et al, requests:

1. The student assignment patterns for Borton and Holladay Elementary Schools will be altered so as to reduce the current minority enrollment in these schools. The Board, however, does not want to limit itself to the options which have previously been shown to them and you. Although one of those options may ultimately be chosen, the Board does not wish to unilaterally impose an option upon unsuspecting parents and children in a settlement.

   Instead, the Board would establish a means by which the public will be informed of and involved in determining what result must be reached, and allow the public to advise the Board as to how the result should be reached.

   The Board will immediately implement this process with a view toward having an option with respect to both Borton and Holladay ready for its review and action. The Board further envisions that

particularly with respect to the propriety and reasonableness of Black teacher assignment to those schools. The Council of Black Educators will be involved in this assessment process and if it is determined that some reassignment of personnel is required, the Board will make the necessary adjustment, subject to the approval of the Court.

4. The District has recently adopted a uniform suspension and expulsion policy and administrative procedures to implement the policy. Copies are attached for your review, as I believe that your concerns have been adequately addressed. Respecting your concerns relating to student evaluation and counseling procedures and techniques, the District agrees to continue its efforts to ensure that no student will be discriminated against in this aspect of the District's educational program.

5. There will be in-service training of all District employees which will be required of all employees involved in implementing the plan ordered by the Court, as well as any commitments made herein. Planning for this effort will be undertaken by District staff as soon as the Court approves each element of the plan and this understanding, and thereafter implemented as appropriate.

a review by counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with constitutional principles.

Should the Board's public process not produce a result satisfactory to both the Board and Plaintiffs, the Board will independently examine the issues and produce a plan for presentation to the Court and to Plaintiffs on or before December 31, 1978, for incorporation into a stipulation and order pursuant to paragraph D 2 above. Implementation of this student assignment adjustment will be completed no later than the commencement of the fall semester of the 1979-80 school year, subject to adjustments thereafter with Court approval.

2. Respecting the alteration of Utterback's attendance patterns, the Defendants agree that these patterns will be modified to reduce the current minority enrollment in that school. Again, as with Borton and Holladay, the Board will utilize the advice of the public when reaching its decision. The process, timetable and procedures here would be the same as indicated in paragraph A 1.

3. Your concern regarding Pueblo Gardens and Cavett will be examined

In this regard, please see Dr. Florence Reynolds' 6/30/78 and 7/10/78 memoranda. These memoranda also address your curricular concerns. In addition, it is understood that qualified parents and the Council of Black Educators will provide input and recommendations to the Educational Services Division as they complete the design for "Programmatic Recommendations to Assist in the Quality Education of Black Students in Tucson."

6. Please see the copy of a draft of a statement regarding non-discrimination in employment which the Board would adopt as part of this settlement.

7. Contained within the proposed non-discrimination statement is a commitment to establish uniform procedures to address your concerns in these areas.

8. Although a concern has been expressed by you that Black teachers not be assigned in such a manner as to isolate them from other Black teachers, as a practical matter this should not be a problem. Assignment of Black teachers in all schools will be addressed during the 1978-79 school year. The Council of Black Educators will be involved in this process and if this examination indicates that reassignment of Black faculty is desirable, the Board may undertake such reassignment beginning in the 1979-80 school year.

9. Please refer, in response to these concerns, to Dr. Reynolds' memoranda dated 6/30/78 and 7/10/78 and to paragraph 5 above.

10. It is the District's position that a child is not admitted to a bilingual instructional program without specific parental permission. In addition, the District agrees that no Black student will be submitted to such a program without first explaining the nature of the program and the available options to the student's parents. An examination of your concern (i.e., any adverse effect of the bilingual program on non-program Black students) will be conducted and if any adverse effects are found respecting non-program students, they will certainly be addressed.

11. Again, Dr. Reynolds' memoranda of 6/30/78 and 7/10/78 briefly discuss the District's position and commitment respecting the concerns and proposals contained in the June 1978 document you presented to me. I have been assured by District staff, and the Board has so directed by authorizing this letter, that all concerns contained in that document will be addressed within the District's total effort.

12. Any citizen's committee that is established to assist the Board in the monitoring or implementing of the District's plan will include

citizens of diverse ethnic and racial backgrounds, including but not limited to Mexican-Americans, Blacks, Anglos, Orientals and native Americans. This committee will include a member or members of the N.A.A.C.P., and shall be selected by the Board.

B. As to Plaintiffs' Mendoza, et al, requests:

1. The student assignment patterns for Davis, Carrillo and Drachman Elementary Schools will be altered, but the Board is quite concerned with the manner in which any change in the assignment of students now attending Davis, Drachman and Carrillo Elementary Schools is to be handled. Accordingly, the Board wants to significantly involve citizens in any process which may result in any school closing or the reassignment of any pupils by permitting them to offer advice to the Board before any decision is made to close, consolidate, or continue to operate these schools and also offer the Board advice on the educational specifications of any new elementary school to be built in the inner city if such is to be the case.

   The Board will immediately implement this process with a view toward having an option ready with respect to these schools for its review and action. The Board further envisions that a review

by counsel for all parties of the fruits of this process be conducted so that the process will produce a result which is palatable to Plaintiffs and consonant with Consitutional principles.

Should the Board's public process not produce a result satsifactory to both the Board and Plaintiffs, the Board will, on or before December 31, 1978, independently examine the issues and produce a plan for presentation to the Court for its approval pursuant to paragraphs 5 and 7 of the Court's Order of June 5, 1978.

2. Please refer to the attached proposed statement regarding non-discrimination in employment. Contained within this document is a commitment to address the concern which you have raised.

3. Please refer to the attached District memorandum dated July 12, 1978, in response to this item, as well as the attached analysis of this program authored by Laura Banks.

As a result of these two memoranda, the District has a significant question respecting the advantage, if any, to students exposed to this program. However, if the parents of at least 25, but no more than 30 children, with full knowledge of the limitations of this program, remain interested in enrolling their children in

this program, the District will offer such a pilot program. These volunteers must be available and signify in writing their intentions, including an acknowledgement of the program's limitations, by August 14, 1978, in order to implement the program in the 1978-79 school year.

The District will provide a teacher for this program who is fully competent to instruct the "Spalding Method." However, that teacher will not necessarily be the person suggested by counsel for Plaintiffs Mendoza, et al, but rather the teacher who is deemed by District personnel to be most competent for the task.

C. Omitted - requires additional data.

D. I solicit any comment which any of you may have with respect to the foregoing, and would appreciate it if you would please offer any comments in writing. In addition, I will require a written letter of intent from all counsel for Plaintiffs both on behalf of the named Plaintiffs and on behalf of all class members, and Plaintiff-Intervenor that the six requirements of settlement made by my clients herein are satisfactory and will be agreed to, providing my clients adhere to the commitments which will be made by them.

REPLY TO MEXICAN-AMERICAN RESPONSE DATED JULY 19, 1978

There does not seem to be a significant distinction between the material in our letter concerning the Mexican-Americans dated July 13, 1978 and their response thereto.

For purposes of clarification, however, several comments should be made.

First, the advisory group which is mentioned in the School Board's letter to all Plaintiffs envisions a group composed of parents of children attending Davis, Carrillo and Drachman Elementary Schools which would concern itself only with those schools. Any citizens' advisory group which would contribute to a plan for the future of all inner city schools would be made up of citizens from throughout the District.

Although the Plaintiffs may not specifically participate in the selection process of the teacher for the one year pilot "Spalding" program, the criteria utilized in selecting a teacher who is fully competent to instruct according to the "Spalding" method will certainly be given to the Plaintiffs. If a teacher currently employed by the School District is not available, one will be found and hired. The deadline for enrolling children in the program could be extended to August 14, 1978.

The Plaintiffs are not correct when they suggest that the District is utilizing only locally developed tests. Evidence presented at trial concerning

the testing of children in the School District should adequately answer the concerns by Plaintiffs.

With respect to paragraph 4 it is the Defendants' position that there is currently a standard procedure for staff promotions within the District which is being refined and shall be made available to you.

In reference to the attorney's fees requested by plaintiffs, please refer to the prior materials contained in this letter.

In reference to the letter received by the Defendants from the Plaintiff-Intervenor, the United States of America, the attorneys for the Defendants have responded to that letter by stating that it is too vague to respond to in the areas concerning approval of the options already presented to Judge Frey on July 17, 1978, and concerning any problems which the Plaintiff-Intervenor may have with the Richey School. Until such time as an adequate response is received from the Government, the Defendants have nothing additional that they can add in response thereto.

We look forward to meeting with you on August 1, 1978, in an attempt to resolve any difficulties which continue

subsequent to the transmittal of this letter to you.

Very truly yours,

DeCONCINI McDONALD BRAMMER
& YETWIN, P.C.

/s/
Richard M. Yetwin

RMY:jc

Enclosures

cc: Edmund Kahn
Dr. Wilbur H. Lewis
Russell N. Jensen

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-759

ALBERTO SANCHEZ, et al

Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al,; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT TUCSON UNIFIED SCHOOL DISTRICT NO. 1'S APPENDIX

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TABLE OF CONTENTS

APPENDIX		PAGE
I.	Notice of Plan Hearing Held August 8-9, 1980	1
II.	Defendants' Plan and Supporting Memorandum	2
III.	Relevant Portions of Pages 56-8 of TUSD #1's Brief Before the Ninth Circuit Court of Appeals	41
IV.	Portion of Page 60, Transcript of Hearing on Pending Motions, August 7, 1978	48
V.	Portion of Pages 145-6, Transcript of Hearing on Pending Motions, August 7, 1978	50
VI.	Portion of Page 5, Transcript of Plan Hearing, August 8-9, 1978	52
VII.	Portion of Page 184, Transcript of Plan Hearing, August 8-9, 1978	54
VIII	Portion of Page 188, Transcript of Plan Hearing, August 8-9, 1978	56
IX.	Portion of Pages 286-7, Transcript of Plan Hearing, August 8-9, 1978	58

X. Portion of Pages 580, 587-9, 606, 618, 650, 680 and 698, Transcript of Settlement Hearing, August 30-31, 1978 60

XI. Portion of pages 480-1, Transcript of Settlement Hearing, August 30-31, 1978 71

XII. Portion of pages 489-91, Transcript Settlement Hearing, August 30-31, 1978 74

XIII Portion of Pages 739-40, Transcript of Settlement Hearing, August 30-31, 1978 79

XIV. Errata to Petitioner's Appendix 83

RESPONDENT TUSD #1'S APPENDIX I

NOTICE OF PLAN HEARING HELD
AUGUST 8-9, 1980

(TUSD News, Vol. 21, No. 1,
Summer, 1978)

RESPONDENT TUSD #1'S APPENDIX II

DEFENDANTS' PLAN AND SUPPORTING MEMORANDUM

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROY and JOSIE FISHER, et al, Plaintiffs, vs. ANITA LOHR, et al, Defendants.	NO. CIV-74-90-TUC-WCF
MARIA MENDOZA, et al, Plaintiffs, vs. TUCSON SCHOOL DISTRICT NO. 1, et al, Defendants.	NO. CIV-74-204-TUC-WCF DEFENDANTS' PLAN AND SUPPORTING MEMORANDUM

In response to paragraphs 2 and 3 of the Court's June 5, 1978, Order, all Defendants except Anita Lohr submit herewith a plan responsive to the Court's findings. In submitting this desegregation plan, the Tucson Unified School District has been guided by the Court's Findings of Fact and Conclusions of law. In the hearing on July 12, 1978 the Court reiterated its admonition that the limited violations identified by the Court should be the subject of a limited remedy. The Court also specified that the remediation must be made in order that any effects of segregative actions be rectified completely and immediately.

The Court made twenty-two findings of fact with respect to the District's neighborhood school concept. These findings of fact vindicate, and

unquestionably recognize, a decisive relationship between that concept and the District's essentially "appropriate dismantlement" of its former dual system in 1951 (Findings of Fact and Conclusions of Law, p. 43, para. 20; p. 44, para. 30). The Court postulated that the neighborhood school concept may have been a necessary vehicle for dismantlement in the first instance, and for ensuring the non-existence of continuing effects of a formal dual system (pp. 44-45, para 30).

In responding to the Court's identification of Constitutional violations, it was clear that the nine named schools divided into three separate groups capable of discrete treatment: Brichta, Manzo and Tully; Roosevelt, University Heights, Jefferson Park and Cragin; and Spring and Safford Junior

Highs. The remedies to be submitted to the Court are also divisible into two separate categories: (1) the necessity to eliminate all vestiges of the past statutory segregation flowing from the existence of Dunbar (p. 222, para. 56); and, (2) the duty to remedy any present effects of past segregative acts. These present effects could be measured only by comparing what the racial or ethnic composition of a school would have been absent segregative acts. In summary, all vestiges of Dunbar and its branches must be eliminated, whereas the present effects of segregation must be remedied by a restoration of the racial or ethnic composition the school would have enjoyed absent the segregative act or acts.

In examining one of the areas designated by the Court for remediation -

- Brichta, Manzo and Tully - - the Court ruled that present effects of past discriminatory acts were being experienced at the three schools. The acts specifically identified by the Court were (1) the timing of Brichta's original construction, (2) the drawing of Brichta's original attendance boundaries, (3) the adding of four permanent classrooms to Brichta in 1964, and (4) placing portables at Brichta in 1972 rather than using space at Tully to relieve Brichta's overcrowding.

Brichta is presently an ethnically balanced school, when considered in terms of district-wide ratios. But this means Brichta has an Anglo majority in a geographical area of the District where the majority of students are Mexican-American. The Court suggested that

Brichta's ethnic composition would more nearly reflect its immediate geographic vicinity had the past discriminatory acts not occurred. As suggested by the Court, had the acts not occurred, Manzo and Tully would have enrolled more Anglo students. The integral Manzo and Tully neighborhoods possessed no constitutional taint, for the Court suggested only that students from outside these two immediate neighborhoods should have been assigned to Manzo and Tully in the past and not that the District caused the integral neighborhoods themselves to be predominantly Mexican-American.

In addition, both the Manzo and Tully neighborhoods meet the criteria established for neighborhood school attendance. That is, both schools are situated in the midst of a residential

area defined by major thoroughfares and natural barriers within which students are able to walk to school.

The plan the District submits to the Court addresses itself to these considerations. The Manzo and Tully neighborhoods are not altered in any way by boundary changes. Tully School adds that portion of the Brichta attendance area bounded by Ironwood Hills (Grant), Silverbell, Camino de Oeste, and Goret, and the Manzo school adds that portion of the Brichta attendance area bounded by Greasewood, Speedway, Trail's End, Camino de Oeste, and Ironwood Hills (Grant). Had Brichta students been assigned to manzo and Tully in the past, it is probable that such assignment would have taken this form, with more students assigned to Tully than Manzo because of space considerations.

This plan reduces Brichta to its immediate walk-in neighborhood plus Silverbell Terrace, a predominantly minority area. This also removes the portables from Brichta which were part of the constitutional violation. The students in the areas formerly designated as being assigned to Brichta are reassigned to both Tully and Manzo Schools, resulting in all three schools more closely approximating the student ethnic percentages in that geographic area of the District. All children currently walking to Brichta, Manzo, and Tully will continue to do so. Those children changing schools are already being transported; so additional student transportation is not required with only slightly increased distance for the transported youngsters to travel. This

plan will have the effect of assigning approximately 184 more Anglo children to Tully and approximately 54 more Anglo children to Manzo. The continuity of educational programs will not be affected and little staff assignment adjustment will be required. It is the District's position that the plan presented respecting these three schools meets the criteria established by the Court.

In the second school area, affecting Roosevelt, University Heights, Jefferson Park and Cragin, the Court identified Roosevelt and University Heights as vestiges of the former dual system. The Court found that the Black neighborhood which developed around Dunbar between 1912 and 1951 was a neighborhood created by state-mandated segregation. The Black population which surrounded Dunbar spread

from the immediate vicinity of Dunbar into the Roosevelt and University Heights attendance areas. The Black residential patterns in these two areas maintain a connection with Dunbar, making them vestiges which must be erased.

Jefferson Park and Cragin were identified by the Court because of the assignment and transportation to those schools of children living north of the Rillito. These children attended Davidson and Whitmore schools, but when these two schools became overcrowded, the foothills students were assigned to the nearest schools then possessing available space--Jefferson park and Cragin. However, when these two schools became overcrowded, the children north of the Rillito were not assigned to University Heights, the next nearest school with

available space. Further, these foothill students were not reassigned to Davidson and Whitmore when space later became available within them. The Court found that the present effects of this discriminatory behavior must be remediated.

That portion of the plan offered by the District with respect to Roosevelt and University Heights attempts to eliminate the vestiges of Dunbar within the framework of the neighborhood school policy. Both Roosevelt and University Heights are closed, eliminating the vestiges of Dunbar root and branch. The Roosevelt neighborhood has suffered in recent years from the encroachment of industry and Pima Community College, with the resultant fragmentation of the neighborhood area. The dispersal of the

Roosevelt children among three schools (Roskruge, Blenman and Cragin), all predominantly Anglo in enrollment, destroys completely any possibility that the Roosevelt vestige could continue to exist.

Although not producing sufficient numbers of school age children, the University Heights residential area is still a viable neighborhood. Therefore, the closure of University Heights in conjunction with the merger of its student body with that of Jefferson Park creates a new, integrated neighborhood, generating a school population which maximally utilizes Jefferson Park. This produces in Jefferson Park an ethnic ratio reflecting the residential population in the area roughly bounded by Fourth Avenue, Campbell, Grant and

Speedway. In order to accommodate this integrated neighborhood, children formerly attending Jefferson Park and residing east of Campbell and north of Grant are assigned to Cragin, and children living south of Grant and east of Campbell are assigned to Blenman. In addition to spatial considerations, these assignments permit these children to attend school without crossing either Grant or Campbell. With respect to both Roosevelt and University Heights, this plan eliminates the vestiges of Dunbar.

The Court did not identify any constitutional violation respecting the Jefferson Park and Cragin neighborhoods, so that the reassignment of the foothills children north of the Rillito (the former Jefferson Park children to Davidson and the former Cragin children to Whitmore)

cannot adversely affect either Cragin or Jefferson Park. Thus, this aspect of the plan adheres to the policy of conveniently located neighborhood schools as well as returning the pattern of student assignment to what it would have been absent the discriminatory actions. In both the restoration of the previous conditions as well as the elimination of the Dunbar vestiges, the District submits that this plan comports with, and satisfies the Court's order.

With respect to the two junior high schools identified by the Court, Spring and Safford, it was determined that Spring was a vestige of Dunbar with a continuing stigma as a school not attended by Anglos. The Court has ordered that all vestiges of Dunbar must be eliminated from the school system.

There were two apparent reasons for the Court's identification of Safford as a school requiring remediation. First, following the closing of Roskruge Junior High in 1972, some Roosevelt graduates were transported to Safford for junior high school. Since Roosevelt was a vestige of Dunbar, these students should presumably have been assigned to a school other than Safford which already had a substantial Black enrollment. This leads to the second reason for the Court's identification of Safford. In 1951, the residential area around Dunbar was partitioned among Spring and Safford Junior Highs. As shown by the Court's statistical findings, the Black student population at Safford has remained relatively constant since 1951. The effect at Safford of the state action

which caused the Black residential concentration around Dunbar does not appear to have diminished over the years.

By recommending the closing of Spring, the District removes root and branch the last remaining vestige of Dunbar. The assignment of students north of Speedway and east of the Santa Cruz removes the Roosevelt students from Safford and assigns them to Doolen, which the Court has suggested should have been done in 1972. This will improve the ethnic balance at Doolen. Former Spring students west of the Santa Cruz will go to Maxwell Junior High. The former Spring students south of Speedway, east of the Santa Cruz and west of Stone will go to Safford.

Safford will remain open pending the building of a new junior high school to

serve the Safford and Mansfeld attendance areas. Meanwhile, Safford Junior High will become a reserve and magnet school which should stabilize its enrollment. Parents will be intimately involved in the planning and location of this proposed junior high. This proposed action will require the approval of the Court in view of paragraphs 5 and 7 of its June 5, 1978 Order. In this instance as well, the plan proposed by the District involves the meeting of its legal obligations with maximum regard for the educational needs of the children affected. The District submits these plans in the belief that they comport with the constitutional mandates ordered by the Court.

In the packets of material which are submitted together with this memorandum,

and which are incorporated herein by reference, several items of information are presented for the Court's consideration in conjunction with the plan. These packets contain materials specifically relating to the various options developed and considered by the Board. Included within these materials are the following:

A. Packet A - Brichta, Manzo and Tully:

1. Options 1-4, including various of the advantages and disadvantages of each. Option 2 is the one which was chosen by the Board and is recommended to the Court.

2. A student transfer and transportation summary, showing that of those students in Option 2 which are moved to a school different than was

attended last year, 74% are Anglos and 26% are minority students.

3. A summary of faculty reassignment, showing that Option 2 will remove 7 teachers from Brichta, and add 3 to Manzo and 4 to Tully, for no net change in the number of teachers for this option.

4. A transportation analysis, which shows that Option 2 will not require any additional funds for transportation nor will any additional students be transported.

5. A non-transportation cost analysis shows that Option 2 will require an additional $1,600.00 in the 1978-79 school year in the food service area.

6. An educational analysis, focusing on any significant change in

program. Option 2 does not indicate any significant programmatic alterations.

7. A memorandum from the principal of Tully indicating the status of Tully as of June 9, 1978.

8. A memorandum from the principal of Manzo indicating that school's status as of June 7, 1978.

9. Three documents utilized by the School Board during their meetings with the parents at the three schools in June 12, 1978 (Manzo), June 18, 1978 (Tully) and June 28, 1978 (Brichta). These documents have various amounts of statistical information about these three schools.

B. Packet B - Roosevelt, University Heights, Jefferson Park and Cragin.

1. Options 1-7A as considered by the Board. The Board chose an amended

version of Option 3 (recommended by the administration) which, with the amendment, became identical to Option 2.

2. A student transfer and transportation summary showing that of those students going to a school different than they attended last year in Option 2 (Option 3 as amended), 49% are Anglo and 51% are minority.

3. A transportation analysis indicating a $49,900.00 transportation cost increase for the year 1978-79, since an additional 179 students need transportation.

4. An educational analysis indicating certain alterations which will need to be accommodated as a result of the reassignment of the students as indicated.

5. A faculty reassignment analysis which indicates, under Option 2, that Blenman will need 3 more teachers, Jefferson Park will need 4 more, Roosevelt will lose 6.5 (since it is closed), Roskruge will add 1, University Heights will lose all of its 8.5 teachers and Whitmore will add 4, for a net decrease of 3 teachers resulting from the reassignment of students pursuant to this Option.

6. Four documents used by the Board during the parent meetings held on June 13, 1978 (Cragin), June 14, 1978 (Roosevelt), June 26, 1978 (University Heights) and June 27, 1978 (Jefferson Park).

7. Two Memoranda dated April 19, 1978 and June 8, 1978 from the Roosevelt

principal which contain certain information about that school.

8. A proposal regarding the plan which was generated by the Jefferson Park faculty immediately after the Court's June 5, 1978 Order was announced.

9. A non-transportation cost analysis which shows that Option 2 (Option 3 as amended) will save the District a total of $209,900.00 during the 1978-79 school year (not taking into account $96,000.00 which would have been spent to re-roof University Heights as needed).

C. Packet C - Spring and Safford.

1. Options 1-5 as considered by the Board. Option 5 was generated by the Board at its meeting on July 12, 1978, and adopted for consideration by the Court.

2. A transportation analysis, indicating for the option chosen by the Board, that an additional 50 children may need to be transported (to Doolen), at a maximum additional annual cost of $5,000.00. The children from Manzo and Tully areas going to Maxwell were already bused to Spring.

3. A faculty reassignment analysis which indicates that Doolen will need 3 additional teachers and Maxwell 9, while Spring, which closes, loses all 16 of its teachers. No change at either Safford or Mansfeld is anticipated as a result of this option, so a net loss of 4 teachers is obtained.

4. An educational analysis which does not indicate any significant programmatic changes as a result of implementing Option 5.

5. A non-transportation cost analysis which shows that Option 5 will generate a $255,625.00 savings during the 1978-79 school year.

6. A July 6, 1978 memorandum concerning the cost of renovating the library at Safford, in the event that a substantial additional number of students should be assigned to that school. The cost would be $88,600.00.

7. Two documents utilized by the School Board during the parent meetings held at Spring (June 21, 1978) and Safford (June 22, 1978).

D. Packet D - Transcripts of Parent Meetings.

1. Transcripts of each of the meetings the Board held with the parents of children attending or to attend the 9 schools identified in its June 5, 1978

Order, and previously discussed in paragraphs A9, B6 and C7 of this memorandum. Most of these transcripts eliminate introductory remarks, and focus only on the comments, questions and concerns of the parents in attendance.

2. The transcript of a General Meeting, to which all members of the public were invited, which was held at Tucson High School on June 29, 1978. Again, only the comments, concerns and questions of the public have been transcribed.

3. Transcripts of meetings held simultaneously at 10 schools (Mansfeld Junior High being the addition) on the morning of July 8, 1978, at which time the various options pertaining to the school at which the meeting was held were presented and explained. Those in

attendance were invited to ask questions and have further input during these meetings. The options, as included within Packets A, B and C, but in a prior form, were available for review and use at the meetings.

4. On July 10, 1978, five meetings were held at the Tucson High School cafeteria, to explain to the general public the options which were available to the School Board for consideration. At the fifth meeting that day (the meetings were held at 9:00 and 11:00 a.m. and 1:30, 3:30 and 7:30 p.m.), the entire School Board was in attendance, although some of the members attended other sessions. Unfortunately, only the first and last meetings were well-enough attended to warrant and be subject to taping and transcription. The

intervening 3 meetings divided into small groups for special attention. Accordingly, transcripts of only the first and last of those meetings were available.

5. On July 11, 1978, the School Board held a public study meeting at which time each of the options pertaining to each of the nine schools identified by the Court were examined in detail by the Board. A transcript of that meeting was made and is included. The public attended that meeting, but no comments from the public were received.

E. Packet E - Miscellaneous Process Materials.

These materials generally review the process through which the School District has gone in examining the Court's June 5, 1978 Order, developing the options which

were presented to the Board and the continuous effort to involve and inform those persons most directly affected by any plan adopted by the Board and approved by the Court.

Two different mailings were made to parents of children in each of the 9 schools identified by the Court. The first mailing concerned the June meetings held in each of those schools, and the second mailing concerned the July meetings. The second mailing was followed by personal telephone calls from either the school's principal or secretary.

The District has also endeavored to involve in the process the teachers who may be affected by the plan. The first part of this effort was a meeting for these teachers which was held on June 12,

1978, 6 days after a meeting was held with District Central Administrative Staff and Principals of the 9 schools involved. The teachers were invited to all parent meetings in both June and July, as well as attending a special meeting for them on July 9, 1978, at which time the teachers were shown the options and had an opportunity to ask questions about them. A communication is being sent to them today keeping them abreast of the situation.

Within these materials are two memoranda respecting the District's concern for various practical problems which are certain to continue to arise. These relate to utilization of the ethnic transfer policy of the District, open-enrollment schools such as Hughes, and special transfer situations involving

working-mothers and children in their last year at a school when their parents move out of that school's attendance area. These concerns will need to be addressed by the Court.

Further included within this packet of materials is a review by the Deputy Superintendent, the Assistant Superintendents for Business, Community, Operations and Student Services, as well as the Director of Federal Liaison concerning the meetings held and efforts expended in developing the plan. These memoranda disclose, to a certain extent, the nature of the various inquiries made during the stages of Plan Development.

Lastly in this packet is a transcript of the official Board Action adopting the options which have been submitted to the Court for approval.

F. Packet F - Bus Routes and Information.

Contained within this packet is a memorandum respecting bus routes, both as to their stops and a narrative description of the routes. A map is provided for each of the Board Adopted Options showing the routes as they have been tentatively established.

G. Packet G - Additional Supportive Materials.

Included within this group of materials are documents which delineate and are supportive of the District's efforts which culminated in the Board's recommendations to the Court. These items are enumerated for reference as follows:

1. Summary enrollment information for the District's schools, both for the

date of June 7, 1978 and projections for the fall semester of the 1978-79 school year.

2. A group of documents summarizing, (a) the status of specially funded programs within the 9 schools for the coming year, (b) various instructional programs for those schools, (c) their library resources, and (d) the status of parent involvement within each school for the coming year.

3. Documents detailing the effects within the junior high schools of the implementation of any of the junior high or elementary options.

4. A summary memorandum indicating the proposed locations of self-contained Adaptive Education Classrooms.

5. Summary information regarding teacher placement as of June 27, 1978.

This status will change, depending upon the Court's action respecting the plan.

6. A July 13, 1978 memorandum which preliminarily addresses the in-service activities which the District will engage in to facilitate the smooth implementation of the plan approved by the Court.

7. Letters to the District from representatives of the University of Arizona and Pima College, signifying their respective interests in acquiring University Heights and Mansfeld as well as Roosevelt.

8. Copies of three documents which have been submitted to the School Board by interested citizens. These are being submitted to the Court for its review.

H. Packet H - Copies of Compliance Documents.

Included within these materials are all the District's Compliance documents which have been generated since the exhibits were filed for trial in the fall of 1976. An additional summary document is being produced to reflect the entire 1977-78 school year. As soon as it has been published, copies will be forwarded to all parties and filed with the Court for consideration. Within these documents are addressed the questions raised by Plaintiffs with respect to items to be included within the process leading up to adoption by the School Board of a plan.

Adoption of Plan.

It is respectfully requested that the Court, after hearing, approve the plan as adopted and recommended by the School Board. Thereafter, it is

suggested that the School District report twice annually the status of the plan to the Court. These reporting dates should be approximately 60 days after the close of each semester, i.e., in early March and early August. This reporting should only occur for the school years 1978-79 and 1979-80. This two-year period of time should allow the Court to carefully determine to what extent the School District has met its obligation as established in the June 5, 1978 Order. The first report should be filed on or before March 15, 1979, and subsequent reports filed as ordered by the Court.

RESPECTFULLY SUBMITTED this 17th day of July, 1978.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.

By_____
J. Wm. Brammer, Jr.
240 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Defendants
other than Defendant Lohr

Copies of the foregoing Plan, Memorandum and Supporting Materials hand delivered this 17th day of July, 1978, to:

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_____

J. Wm. Brammer, Jr.

RESPONDENT TUSD #1'S APPENDIX III

RELEVANT PORTIONS OF PAGES 56-8 OF TUSD #1'S BRIEF BEFORE THE NINTH CIRCUIT COURT OF APPEALS

(Describes benefits received by the class of Mexican-American students by reason of the Settlement)

* * *

Appellants' assertion that the Mexican-American class received nothing under the settlement except the "Spalding method" voluntary language class (Appellants' Brief p. 31) is clearly false. For instance, the Stipulation requires the School District to:

(a) Alter the student assignment patterns at Borton and Holladay Elementary Schools, both of which were predominantly Mexican-American, so as to reduce minority enrollment below 50 percent (Stipulation of Settlement, CR 610, p. 5997);

(b) Recommend a process for parent participation to examine the future student assignment patterns and educational specifications for Davis,

Drachman and Carrillo Elementary Schools, all of which were predominantly Mexican-American (Id.);

(c) Alter the student assignment patterns for Utterback Jr. High School, previously predominantly Mexican-American, to reduce minority enrollment to below 50 percent (Id.).

(d) Insure that the junior high school into which the graduates of Pueblo Gardens and Cavett Elementary Schools (both predominantly Mexican-American schools) matriculate does not exceed 50 percent minority student enrollment (CR 610, p. 5998);

(e) Adopt a non-discrimination in employment statement, and establish uniform procedures with respect to hiring, placement and promotion of District employees (CR 610, p. 5999);

(f) Develop and implement in-service training programs which were required of all District employees involved in implementing the Stipulation o Settlement (CR 610, p. 6000);

(g) Demonstrate good-faith efforts to insure that no student is discriminated against in the implementation of the District's uniform suspension and expulsion policy, and to obtain specific recommendations in this regard from Black and Mexican-American parents (Id.);

(h) Conduct a careful good-faith examination of testing instruments used by the Defendants to insure that no student is discriminated against in this aspect of the District's educational program (Id.);

(i) Institute a practice of not admitting a student to a bilingual instructional program without specific parental permission following an explanation to the student's parents of the nature of the program and the options available, including programs of standard English as a second dialect (e.g., B.A.S.E.) (Id.);

(j) Obtain external data to evaluate the bilingual instructional programs (CR 610, pp. 6000-1).

Numerous witnesses testifed on August 30 and 31 that the benefits resulting from many of the School District's obligations included within the Settlement would benefit Mexican-American as well as Black students. (See testimony of Dr. Driggs, Transcript Vol. IV, pp. 579-80); Dr.

Charles Ford, Transcript Vol. IV, pp. 587-9; Mildred Wilson, Transcript Vol. IV, pp. 605-6; Mrs. Sparks, Transcript Vol. IV, p. 618; Dr. Doris Ford, Transcript Vol. IV, p. 644; Dr. Tidwell, Transcript Vol. IV, p. 650; Anna Jolivet, Transcript Vol. IV, p. 680 and Dr. Charles Grubbs, Transcript Vol. IV, pp. 698-9).

The District agreed to review and revise, if appropriate, minority enrollment in at least five schools which were not found by the Court's June 5, 1978, Order to be operating unlawfully but which historically have been predominantly Mexican-American.

The Mexican-American class had very little to give to the Defendants in return. Negotiation of the settlement depended on the relative strengths and

weaknesses of the position of the Mendoza plaintiffs. The Court's June 5, 1978 Findings of Fact and Conclusions of Law reveal that the Mendoza plaintiffs had failed to prove almost all of their allegations. (See CR 208 at pp. 2355 (para. 25), 2432 (para. 77), 2454-5 (para 14), 2482-3 (para. 7), 2513 (para. 39), 2523 (para. 3), 2524 (para. 6), 2525 (para. 9-10), 2526-7 (para. 12), 2529-30 (para. 20), and 2548 (para. 49)). (See discussion supra, pp. 2-3). . . .

RESPONDENT TUSD #1'S APPENDIX IV

PORTION OF PAGE 60, TRANSCRIPT OF HEARING ON PENDING MOTIONS, AUGUST 7, 1978

STATEMENT OF MR. J. WM. BRAMMER, JR., COUNSEL FOR TUSD #1

* * *

MR. BRAMMER: All I've heard, Your Honor, is that people are opposed to the closing of schools. And if that's what we're talking about, this Court has identified tomorrow as the date with which the School District can present evidence and people can suggest alternatives to the Court concerning the plan, then the Court has established the date of the 24th of this month for people to appear after notice and pursuant to Rule 23 concerning any settlement which finally gets filed with this Court. . . .

* * *

RESPONDENT TUSD #1'S APPENDIX V

PORTION OF PAGES 145-6, TRANSCRIPT
OF HEARING ON PENDING MOTIONS,
AUGUST 7, 1978

STATEMENTS OF THE DISTRICT COURT
AND MR. ARMAND SALESE, COUNSEL
FOR PETITIONERS

* * *

MR. SALESE: Your Honor, I might suggest to the Court as to general positions and issues on the plan or plans, that the proper inquiry for cross examination is - - I think the Court has already set August the 24th for the time at which we deal with the plan, at least the school's plan.

THE COURT: Well, no, we've designated tomorrow morning to deal with the desegregation plan. We set August 24th for the time to deal with the proposal or the settlement of this lawsuit and an opportunity for the members of the class to be heard on the proposed settlement overall. . . .

* * *

RESPONDENT TUSD #1'S APPENDIX VI

PORTION OF PAGE 5, TRANSCRIPT OF PLAN HEARING, AUGUST 8-9, 1978

(Designated in record below as Hearing on Proposed Plan, Vol. I, pages 1-265, at 5)

STATEMENT OF THE DISTRICT COURT

* * *

THE COURT: Would you take the witness stand right over here, please, sir?

At the outset, I think the record should reflect that this is the time set for hearing on the defendants' proposed plan for desegregation pursuant to the Court's order. You may proceed.

* * *

RESPONDENT TUSD #1'S APPENDIX VII

PORTION OF PAGE 184, TRANSCRIPT OF PLAN HEARING, AUGUST 8-9, 1978

(Designated in record below as Hearing on Proposed Plan, Vol. I, pages 1-265, at 184)

STATEMENTS OF MR. DONALD PITT AND THE DISTRICT COURT

* * *

[MR. PITT]:....This is because if we close Mansfeld, which is outside of Judge Frey's order, we are going to now take the students over here at Safford and over here at Spring and put them in some new school. So what I am asking the Court to consider, in its wisdom, is that in looking at the stipulation and entering a final order in this matter --

THE COURT: Which, by the way, is not the scope or purpose of this hearing.

* * *

RESPONDENT TUSD #1'S APPENDIX VIII

PORTION OF PAGE 188, TRANSCRIPT
OF PLAN HEARING, AUGUST 8-9, 1978

(Designated in record below as Hearing
on Proposed Plan, Vol. I, pages 1-265,
at 188)

STATEMENTS OF THE DISTRICT COURT,
AND MESSRS. RUBIN SALTER, JR.,
COUNSEL FOR RESPONDENTS FISHER, ET AL.,
AND DONALD PITT

* * *

MR. PITT: I was just trying to find out what the intent of the stipulation was.

THE COURT: Well, perhaps they can give us both.

MR. SALTER: If he will come back on the 24th, Your Honor, we will define it for him.

THE COURT: And I think really that's the time when we should delve into that matter. What we're concerned with here now is Option Five. . . .

* * *

RESPONDENT TUSD #1'S APPENDIX IX

PORTION OF PAGES 286-7, TRANSCRIPT
OF PLAN HEARING, AUGUST 8-9, 1978

(Designated in record below as Hearing
on Proposed Plan, Vol. II, pages 266-455
at 286-7)

STATEMENTS OF TOBY ENGLER AND
THE DISTRICT COURT

* * *

MRS. ENGLER: Okay. I think I've stated some of my objections.

The other thing I wanted to know is that, wouldn't it be just as valid, since both Safford and Spring are named in the Court order as having vestiges of segregative intent, and Mr. Brammer has told me that Mansfeld is being considered as part of a long-range remedy, wouldn't the wording of paragraph number five in this document --

THE COURT: Well, if you are talking about the settlement document now, we'll get into that matter in another hearing. What we are concerned with here is only insofar as it may relate to Option Five.

* * *

RESPONDENT TUSD #1'S APPENDIX X

PORTION OF PAGES 580, 587-9, 606, 618, 650, 680, AND 698, TRANSCRIPT OF SETTLEMENT HEARING, AUGUST 30-31, 1978

(Designated in the record below as Hearing on Proposed Plan, Vol. IV, pages 473-783, at 580, 587-9, 606, 618, 650, 680 and 698).

STATEMENTS OF ARMAND SALESE, COUNSEL FOR PETITIONERS, DONALD DIGGS, MORRIS BALLER AND MICHAEL ZAVALA, COUNSEL FOR RESPONDENTS MENDOZA, ET AL., CHARLES FORD, THE DISTRICT COURT, MILDRED WILSON, RUBIN SALTER, JR., COUNSEL FOR RESPONDENTS FISHER, ET AL., VERTIE SPARKS, CLYDE TIDWELL, ANNA JOLIVET, J. WM. BRAMMER, JR., COUNSEL FOR RESPONDENT TUSD #1, DR. CHARLES GRUBBS,

* * *

[p. 580]

BY MR. SALESE:

Q. Doctor, the programmatic changes that you reviewed for Mr. Salter, and upon which you have commented, those are for Black students in Tucson School District Number 1; are they not?

[DR. DIGGS]

A. Those changes would benefit all students.

Q. But do you know whether or not those changes are envisioned for Black and Mexican-American students or just Black students?

A. I think they are envisioned for all students.

Q. So that the portion of the settlement is to include and to be utilized for Mexican-American students also?

A. Students, period.

* * *

* * *

* * *

[pp. 587-9]

BY MR. BALLER:

Q. Dr. Ford, do you believe that the implementation of the programmatic recommendations would work to the benefit of Mexican-American students as well as Black students?

[DR. FORD]

A. Having not done the research with Mexican-American children, I would say probably; I would say probably.

Q. You did say that in formulating those recommendations I believe you told Mr. Salter that you were concerned with improving the education for all students?

A. That's correct.

MR. BALLER: Thank you. No further questions.

THE COURT: Mr. Salese? Before Mr. Salese asks you any questions, in connection with Mr. Baller's last question, do you feel that any of these programs that are recommended as part of the settlement on behalf of the Black children would have an adverse effect on Mexican-American children in any way?

THE WITNESS: Your Honor, no, we felt that the programs that we had proposed are based in sound educational practices.

THE COURT: Very well. Thank you. Mr. Salese?

MR. SALESE: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SALESE:

Q. Sir, the programs that your

organization prepared and researched, and what you've testified about, they were designed primarily for Black students; isn't that correct?

A. That's correct.

Q. And that the research and the data used to support or to select alternative methods of increasing the ability of Black students to compete and to get a better education, that has foundation with Black students? In other words, you were studying the performance of Black children in other programs where they've been involved and have done well, et cetera, in terms of determining what programs you would include in this recommendation to the Court?

A. I will answer that question with qualifications.

Q. Now - - Pardon me.

A. Having worked both with Mexican-American children, as well as Black children, I feel that in my professional judgment, it would be that some of those, since these programs are founded in sound educational practices as they relate to minority children, I would think that these programs should work for Mexican-American children also.

* * *

* * *

* * *

[p. 606]

[BY MR. SALTER]

Q. And as a Black and as a teacher, would you recommend this program as a viable one to assist Black children - - well, Black and all children in achieving a better quality of education?

[MS. WILSON]

A. I very highly recommend it.

Q. Now, this program will work for Mexican-Americans, in your opinion, as well?

A. Yes.

Q. And you know it works for Anglos as well?

A. Yes.

* * *

* * *

* * *

[p. 618]

BY MR. BALLER:

Q. Mrs. Sparks, in your work, have you worked with substantial numbers of Mexican-Americans as well as Blacks?

[MRS. SPARKS]

A. Yes, I have.

Q. And is it your feeling that the recommendations made by the Coalition, if they were implemented, would benefit Mexican-Americans as well as Blacks?

A. I do believe.

* * *

* * *

* * *

[p. 650]

BY MR. ZAVALA:

Q. Dr. Tidwell, are you familiar with the District's new formal policy with respect to expulsions and suspensions?

[DR. TIDWELL]

A. Yes.

Q. Does that policy apply only to a Black or every child in the District?

A. Every child in the District.

* * *

* * *

* * *

[p. 680]

[BY MR. SALTER]

Q. And you have heard of a document entitled Programmatic Recommendations to Improve the Quality of the Education for Black Children; have you not?

[DR. JOLIVET]

A. Yes, I have.

Q. And as a professional educator, as a Black, do you believe that with the implementation of that program, it will improve the quality of education for, not only Black children, but all children within the District?

A. Yes.

* * *

* * *

* * *

[p. 698]

[MR. BRAMMER]

Q. Anywhere within those policies, or within the policies of the administrative regulations, or the guidelines, Dr. Grubbs, is there any distinction made between types of pupils based upon their race or ethnicity?

[DR. GRUBBS]

A. No, there is no distinction whatsoever.

Q. Those guidelines and regulations and Board policies are directed toward District students, whatever their race or ethnicity; is that right?

A. That is true.

RESPONDENT TUSD #1'S APPENDIX XI

PORTION OF PAGES 480-1, TRANSCRIPT
OF SETTLEMENT HEARING,
AUGUST 30-31, 1978

(Designated in the record below as
Hearing on Proposed Plan, Vol. IV,
pages 473-783, at 480-1)

STATEMENTS OF THE DISTRICT COURT AND MR.
ARMAND SALESE, COUNSEL FOR PETITIONERS

* * *

THE COURT: Well, let me disabuse your mind and cut this short. The Court has already ruled on that matter, and I'm not going to relitigate - - I'm not going to hear any more argument on it. So with respect to that, the Court has already heard and ruled upon that so don't dredge that up again. You've made your record on it and you are free to pursue your remedy on that matter. You are just wasting time now plowing that ground again.

MR. SALESE: Well, Your Honor, the problem I have - -

THE COURT: The problem you have is that you cannot seem to accept the fact that the ruling has been made on the desegregation plan. What we're concerned with now, and only with now is the

settlement. Now, the fact that the settlement, in essence, adopts the Court's plan, that is of no consequence, really, insofar as the settlement is concerned. The Court independently made that determination. Now, if counsel want to accept it, that's fine; if they don't their remedy is to go to the Court of appeals.

MR. SALESE: So as I understand it then from Your Honor, then the closure issue, the plans submitted are not part of the settlement?

THE COURT: The closure, insofar as the Court's order of desegregation is concerned, is not in issue.

* * *

RESPONDENT TUSD #1'S APPENDIX XII

PORTION OF PAGES 489-91, TRANSCRIPT
OF SETTLEMENT HEARING,
AUGUST 30-31, 1978

(Designated in the record below as
Hearing on Proposed Plan, Vol. IV,
pages 473-783, at 489-91)

STATEMENT OF THE DISTRICT COURT

* * *

[THE COURT]

. . . .As counsel have indicated, this case has gone on for a long time. All the main counsel in the case and the Court have been living with this case. We all considered literally thousands upon thousands of pages of testimony, depositions, exhibits in this case. We have a whole room full of evidence that was presented in this case. It took Court and counsel a couple of years to collate and to consider all of that matter. And with the cursory examination, it should have been apparent that Count One of the plaintiffs in the Mendoza case, 74-204, was the crux of the complaint. Count One was the count that alleged the creation and maintenance of a tri-ethnic segregated system. Counts

Two, Three, Four, Five, Six and Seven and Eight were merely adjuncts thrown in to support Count One.

Now, the Court and counsel recognize this, that these matters weren't separate counts, weren't separate items to be litigated separate and apart from the main issue of discrimination or segregation, but that they were valid issues to be considered and valid issues on which evidence should be presented with respect to the main issue in the case, to-wit: Discrimination and segregation. And to illustrate, Count Two alleged discriminatory tracking of students. Evidence was presented on that matter, substantial evidence.

Count Three: Inferior curricula and facilities for minorities. Again, substantial evidence was presented and

the issue was tried. And to say now that those issues should be relitigated is, as I say, either a smoke screen or borne from lack of information about what was tried in this case.

Count Four: Discrimination in the hot lunch program. Again, that was considered. Failure to properly take into account linguistic differences. Substantial evidence was presented. Lack of bilingual notices. Again, and there is a ruling with respect to such matters, a finding.

Count Eight: Failure to employ and promote Chicano staff. Again, a ruling on that matter. There is no one in this case with standing to raise that issue except insofar as it goes to discriminatory intent, segregative intent. It's in the record. And to say

that anyone is being deprived, or has been deprived of any opportunity to present evidence in this case is a sheer misstatement, that is, in view of the tremendous nature of the, and quantity of the evidence that was presented and considered. And at this late date, to say there wasn't sufficient evidence presented, and I dare say you'll find any case, or none that I can think of that I read, where the evidence was as substantial as the evidence was in this case, where counsel worked harder to marshall their evidence and present everything that could be obtained which might reasonably bear on the issues that were before the Court. . . .

* * *

RESPONDENT TUSD #1'S APPENDIX XIII

PORTION OF PAGES 739-40, TRANSCRIPT
OF SETTLEMENT HEARING
AUGUST 30-31, 1978

(Designated in the record below as
Hearing on Proposed Plan, Vol. IV,
pages 473-783, at 739-40)

STATEMENTS OF MESSRS. WILLIAM J. MALEDON,
EDMUND KAHN, J. WM. BRAMMER, JR., ARMAND
SALESE, AND THE DISTRICT COURT

* * *

MR. MALEDON: Your Honor, we just have one other brief matter.

Your Honor, paragraph 26 of the stipulation of settlement provides that the plaintiffs shall submit documentation relating to the attorneys' time and expenses that's been put in in connection with this litigation. And in order to comply with that paragraph, Your Honor, and also for the edification of the members of the class and for the Court, I have here, Your Honor, which I'd like to have marked, and which I would offer into evidence as Exhibit One, copies of the time records of all of the plaintiffs' lawyers involved in the litigation; also I have copies of the expense records of all of the plaintiffs' lawyers involved in the litigation. They are all in that

one folder. I would simply point out to the Court that those documents disclose approximately 11,000 hours of attorney and law clerk time on behalf of all of the plaintiffs' attorneys, and in excess of $153,000 of direct out-of-pocket expenses since the inception of the litigation incurred by our firm, Mr. Salter, Mr. Zavala and Mr. Baller.

We have nothing further, Your Honor, unless the Court has any questions with respect to that exhibit.

Thank you, Your Honor.

THE COURT: Any objection to marking the exhibit into evidence, gentlemen?

MR. KAHN: No objection, Your Honor.

MR. BRAMMER: No, Your Honor.

MR. SALESE: Your Honor, we have no objection. I think our objection with respect to attorneys' fees is raised in my memorandum.

THE COURT: It goes to the settlement in general.

MR. SALESE: Right.

THE COURT: And the inclusion into the settlement of this matter.

MR. SALESE: Right, not to the validity of the amounts or the costs.

THE COURT: Very well. Thank you. The Plaintiffs' Exhibit Four may be marked in evidence.

Mr. Maledon, your representation as to the hours shown in that exhibit appear to be in keeping with some of my earlier comments here today. The time and effort expended on this case, as I stated earlier, have been fantastic. It doesn't appear that any stone has been unturned.

* * *

RESPONDENT TUSD #1'S APPENDIX XIV

ERRATA TO PETITIONER'S APPENDIX

Some errors have been discovered in the Appendix submitted by Petitioners. Numerous misspellings were apparent, but will not be corrected unless the context requires. Reference will be made to the Appendix' page and line or item number, followed by the correction.

1. p. ii, item U. ". . . July 26 . . . ."

2. p. 10, l. 12, ". . . employee training, and in policies on testing . . . ."

3. p. 22, following L. 4 ending in ". . . purpose of . . . ." should be inserted ". . . the Plan Hearing (August 8th and 9th) and the status of . . . ."

4. p. 22, l. 13, ". . . 11th Order, what was and was not decided by the August 11th Order . . . ."

5. p. 37, l. 12, ". . . fore the Court, we must ask whether the trial

court had sufficient facts before . . . ."

6. p. 83, 2nd and 3rd lines from bottom should read: "The school attendance areas for Manzo and Tully remain unchanged."

7. p. 84, l. 1, ". . . students would remain very heavily minority . . . ."

8. p. 94, last line, ". . . Safford, partly to Doolen, and partly to Mansfeld."

9. p. 122, l. 4, ". . . F.2d 799 (3rd Cir. 1974), cert. denied . . . ."

10. p. 127, subparagraph 1, lines 4 and 5 should read ". . . approved by all parties, and stipulation of dismissal with prejudice Counts 2, 3, 4, 5, 6, and 7 of the Amended Complaint of the Plaintiffs Mendoza, et al., which has

been signed by all parties who have appeared in this action."

11. p. 143, l. 4, ". . . federal court from the terms of this stipu-. . . ."

12. p. 153, 1st line of salutation, "To: The Parents, Guardians and/or Next . . . ."

13. p. 159, 2nd line from bottom, ". . . 1978-79 school year through a process . . . ."

14. p. 173, 1st line of pleading title should be: "Joint Motion of Plaintiffs, ..."

15. p. 179, additional places appear for signature of counsel for Defendants-Intervenors Sutton, et al., and for Plaintiff Alberto Sanchez, individually. The signatures of these

counsel do not appear on and were not affixed to the original document.

16. p. 196, 3rd line from bottom, ". . . 1978, by me, on behalf of my clients, to the Court pursuant to its Order of June 5, 1978. These elements, ..."

17. p. 199, subparagraph D.2:

a) l. 1, "That on or before July 1, 1983, ..."

b) l. 3, ". . . theretofore complied with the lawful orders entered in the above captioned causes and have complied with the . . . ."

18. p. 203, l. 1, ". . . school year" (this subparagraph ends here).

19. p. 214, l. 18, ". . . respect to our requested changes to your . . . ."

20. p. 221:

a) 1. 4, ". . . paragraphs which were not changed from the original, and certain paragraphs which were changed by the . . . ."

b) 3rd line of subparagraph 1, ". . . tion of the original July 13, 1978 . . . ."

21. p. 231 should be p. 232, preceding p. 233.

22. p. 232 should be p. 231, following p. 230.

23. p. 234, subparagraph 10, l. 7, ". . . be admitted to such a program . . . ."

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NO. 80-759

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al.

Petitioners

vs.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al.; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., ROY and JOSIE FISHER, et al., and SIDNEY L. SUTTON, et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENTS ROY AND JOSIE FISHER, ET AL.

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Fisher, et al.

INDEX

	PAGE
TABLE OF CITATIONS	iii
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	6
I. Whether Notice by Publication and General Distribution Denied the Class Due Process of Law	6
A. This Court's Decisions Do Not Support the Proposition Urged by Petitioners	7
B. There is No Conflict Among the Circuits; the Cases Uniformly Support the Conclusion that Neither Rule 23 Nor the Due Process Clause Requires Individual, Mailed Notice in Every Case	10
C. Due Process Does Not Require the Court to do More Than It Did in This Case	15
II. Whether Notice Omitting Specific Reference to School Closures Denied the Class Due Process of Law	23
III. Whether Notice Omitting Reference to Dismissal of the Quality of Education Counts in the Mexican-American Complaint Denied the Class Due Process	24

IV. Whether Inclusion of Attorneys' Fees and Reimbursement of Costs to Class Counsel in the Stipulation of Settlement Necessarily Renders the Settlement Unfair 27

V. Whether the Two-Fold Hearing Approach Used by the District Court in the Instant Case to Consider Objections to the Proposed Remedial Plan of the School District and Separate Objections to the Settlement of Other Issues Denied the Class Due Process 34

CONCLUSION 35

TABLE OF CITATIONS

CASES	PAGE
Alexander v. Aero Lodge No. 735, 565 F.2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978	11, 12 15
Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980)	13, 14
Bijeol v. Bison, 513 F.2d 965 (7th Cir. 1975)	11, 12
Bradley v. School Board of Richmond, 416 U.S. 696 (1974)	27
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)	7, 9
Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2nd Cir. 1968)	12
Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), mod. sub. nom. on other grounds, 442 U.S. 682, 687 (1979)	11
Frost v. Weinberger, 515 F.2d 57 (2nd Cir. 1975)	11, 12
Gilbert v. General Electric Co., 519 F.2d 661 (4th Cir. 1975), rev'd on other grounds, 429 U.S. 125 (1976)	11
Grigsby v. North Mississippi Med. Center, Inc., 586 F.2d 457 (5th Cir. 1978)	11

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975), cert. denied, 423 U.S. 864 (1976) 25

Hansberry v. Lee, 311 U.S. 32 (1940) 15

In re General Motors Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979) 32

Larionoff v. United States, 533 F.2d 1167 (C.A.D.C. 1976), aff'd, 431 U.S. 864 (1977) 11, 15

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977) 25,

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 7, 8

Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977) 32

Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975) 11

Schrader v. Selective Service System, 470 F.2d 73 (7th Cir.), cert. denied, 409 U.S. 1085 (1972) 12

Sosna v. Iowa, 419 U.S. 393 (1975) 9

Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3rd Cir. 1975), cert. denied, 421 U.S. 1011 (1975) 11, 1

Yaffe v. Powers,
454 F.2d 1362 (1st Cir. 1972) 11

Zeilstra v. Tarr,
466 F.2d 111 (6th Cir. 1972) 12

RULES OF PROCEDURE
Rule 23(b)(2) 10, 11, 14, 21
Rule 23(b)(3) 9
Rule 23(c)(2) 9
Rule 23(e) 13, 14

PUBLICATIONS
Note, Developments in the Law--
Class Actions,
89 Harv. L. Rev. 1318 (1976) 21, 33

STATUTES
20 U.S.C. § 1617 27
42 U.S.C. § 1988 27

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Respondents Roy and Josie Fisher, et al., representing a class composed of all black students and parents of black students attending grades 1 through 8 in the Tucson Unified School District No. 1, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 623 F.2d 1338.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition filed on behalf of Alberto Sanchez, et al., is substantially at variance with the events as seen by each of the Respondents who participated substantively in the lengthy trial court proceedings in this case, including this Respondent, who represented the class of black plaintiffs below, as well as the Respondent School

District, which was a defendant below, the Mendoza, et al., Respondents, who represented the class of Mexican-American plaintiffs below, and the United States, which intervened on behalf of plaintiffs. In order to avoid duplication, we adopt by reference the statement of the case set forth in the Response submitted on behalf of Respondent Tucson Unified School District No. 1. The careful explication of the facts contained in the School District's Response--and especially the chronology of events leading up to the District Court's adoption of the plan of desegregation and subsequent approval of the settlement--provides the proper foundation for consideration of the several issues that Petitioners contend are worthy of review by this Court.

Before turning to those issues, we wish to add one prefatory note as representatives of all black elementary and junior

high school students in Tucson School District No. 1. As the Ninth Circuit correctly noted, the discovery, trial and ultimate settlement phases of this litigation were handled by the District Court on a consolidated basis. That is, separate school desegregation lawsuits filed first by representatives of the black student class, and subsequently by the Mexican-American student class, were brought together for a single pretrial and trial process. Nonetheless, as a matter of proper procedure, Petitioner Sanchez--as the court below stated--is "a party only to the [Mexican-American] case and his appeal is properly understood as an appeal only of [that] case." 623 F.2d at 1341n.1. It is, however, quite inaccurate to assume that Petitioners could obtain, in this Court, the relief they seek without having a direct impact on the class of black children now benefiting from a settlement that is now in its third year of operation. In

that regard, it is important to note that the Petition does not purport to challenge the legal correctness of the District Court's decision on the merits; the Petition does not contest the legal correctness of the plan of desegregation ordered by the court; and the Petition does not contest--on the merits--the propriety and fairness of the settlement. For the reasons that follow, we think the collection of procedural complaints that do provide the basis for the Petition are totally without merit, but we would ask this Court, in considering whether to exercise its discretionary prerogative to review this case by writ of certiorari, to consider whether those legal objections are sufficiently meritorious to justify setting aside the extensive desegregation and educational gains that black children in Tucson have already begun to enjoy under the desegregation plan and stipulation of settlement.

REASONS WHY THE WRIT SHOULD BE DENIED

We will address the five issues raised by Petitioner in the order in which they are set forth in the Petition.

I. Whether Notice by Publication and General Distribution Denied the Class Due Process of Law.

Petitioners argue that the District Court erred in ordering, and the Court of Appeals erred in affirming, a notice of proposed settlement that was disseminated through the local newspapers, broadcast media and through distribution at places within the School District where persons interested in the settlement might find it. Instead, Petitioners contend that the due process clause of the Constitution requires individual mailed notice "in any case where [interested persons'] identity and whereabouts are easily determined."

Petition, at 22. There are several reasons why this Court should not grant a writ of certiorari to consider this issue.

A. This Court's Decisions Do Not Support the Proposition Urged by Petitioners.

Petitioners place their principal reliance upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Neither case, nor any other decisions of this Court of which we are aware, supports the proposition that individual, mailed notice is required in every case. Mullane was not a class action case. Rather, it involved the propriety of notice by publication in a local newspaper of a judicial settlement of accounts by a trustee of a common trust fund. This was a proceeding directly affecting the pecuniary or property interests of each individual

member of the class of beneficiaries, a case quite different from a class action of the type involved here where only class-wide structural relief was requested. The Court was careful to note that it was not establishing in Mullane any inflexible rule with respect to notice:

> "The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensible to the process due to residents . . . . We disturb none of the established rules on these subjects."

99 U.S. at 314. Stated simply, nothing in the Mullane opinion purports to lay down the inflexible rule urged upon this Court by Petitioners.

Neither does Mr. Justice Powell's Eisen opinion stand for the proposition urged

here. The Court in that case was careful to rest its holding on a reading of Rule 23(c)(2) of the Federal Rules of Civil Procedure. While the Court did hold that this Rule "required that individual notice be sent to all class members who can be identified with reasonable effort," the Court was quite clear in limiting the scope of its holding to so-called (b)(3) class actions:

> "We are concerned here only with the notice requirements of subdivision (c)(2), which are applicable to class actions maintained under subdivision (b)(3). By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2)."

Id. at 177 n.14. In a case decided during the following Term, Sosna v. Iowa, 419 U.S. 393 (1975), the Court reiterated the limited extent of its Eisen opinion. In Sosna--as in this case--the class action sought injunctive and declaratory relief

rather than a monetary recovery. Because the class involved was a so-called (b)(2) class, "the problems . . . which were considered by this Court last Term in Eisen . . . are not present in this case." 419 U.S. at 397 n.4. In short, neither Mullane nor Eisen addresses the question of notice to members of a class seeking declaratory and injunctive relief.

B. There is No Conflict Among the Circuits; the Cases Uniformly Support the Conclusion that Neither Rule 23 Nor the Due Process Clause Requires Individual, Mailed Notice in Every Case.

The question whether individualized notice is required in class actions brought to obtain injunctive and declaratory relief has been considered now by virtually every Circuit. Every case we have found, and there are a good many of them, concludes that the individualized notice called for in Eisen is not required where the action

is one brought under Rule 23(b)(2). This is the unanimous view of virtually all of the Circuits. See, e.g., Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 254-57 (3d Cir. 1975), cert. denied, 421 U.S. 1011 (1975); Gilbert v. General Electric Co., 519 F.2d 661, 667-68 (4th Cir. 1975), rev'd on other grounds, 429 U.S. 125 (1976); Grigsby v. North Mississippi Med. Center, Inc., 586 F.2d 457, 461 (5th Cir. 1978); Alexander v. Aero Lodge No. 735, 565 F.2d 1364, 1373 (6th Cir. 1977), cert. denied, 436 U.S.. 946 (1978); Bijeol v. Bison, 513 F.2d 555, 558 n. 3 (7th Cir. 1975); Elliott v. Weinberger, 564 F.2d 1219, 1228-29 (9th Cir. 1977), mod. sub. nom. on other grounds, 442 U.S. 682, 687 (1979); ; Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975); Larionoff v. United

States, 533 F.2d 1167, 1184 (C.A.D.C. 1976), aff'd, 431 U.S. 864 (1977). Prior to Eisen, it appeared that courts of appeal in three circuits might have been inclined to hold individualized notice to be required generally under Rule 23, but each of those circuits in cases decided subsequent to Eisen has now rejected that conclusion. Compare Frost v. Weinberger, supra, with Eisen v. Carlisle and Jacquelin, 391 F.2d 555, 564-65 (2d Cir. 1968); and compare Alexander v. Aero Lodge No. 735, supra, with Zeilstra v. Tarr, 466 F.2d 111, 113 (6th Cir. 1972); and compare Bijeol v. Benson, supra with Schrader v. Selective Service System, 470 F.2d 73, 75 (7th Cir.), cert. denied, 409 U.S. 1085 (1972). Thus, whatever controversy might be thought to have existed has--to quote Judge McGowan's recent conclusion after reviewing some of the cases cited above--"diminished considerably after the Supreme

Court's decisions in Eisen . . . and Sosna . . . ." Larionoff v. United States, 533 F.2d at 1184.

Although Petitioners do not cite any of these cases, they allege that there exists a "division of authority among the circuits." Petition, at 20. The only case cited by Petitioners is Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980). That case, however, does not deal with Mullane, Eisen or any of the other lower court cases that have addressed the (b)(2) notice requirement. The only possibly relevant language in that opinion is a reference, in dictum, to the requirement of Rule 23(e) that the settlement of school desegregation cases (as well as other class action suits) may not proceed "without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all the members of the class in

such manner as the court directs." Fed. R. Civ. P. 23(e). But the opinion does not talk about the manner of notice and does not suggest that notions of due process or the detailed requirements of Rule 23 impose a duty of individualized, mailed notice. 616 F.2d at 313. There is, therefore, no basis for asserting the existence of a conflict among circuits.

In any event, in light of the cases cited above, it cannot fairly be argued that any Circuit, including the Seventh Circuit, has adopted a rule requiring individual notice in (b)(2) cases. Surely, if a class action of this type can be maintained and brought to judgment on behalf of the class without individual notice to the class members, such an action can be settled without individual notice.

C. Due Process Does Not Require the Court to do More Than it Did in This Case.

Several courts of appeal have assessed the due process requirements that apply in ascertaining what notice is required where the underlying action seeks injunctive or declaratory relief. See, e.g., Wetzel v. Liberty Mutual Ins. Co., 508 F.2d at 254-57; Griggs v. North Mississippi Med. Center, Inc., 586 F.2d at 461; Alexander v. Aero Lodge No. 735, 565 F.2d, at 1373-74; Laionoff v. United States, 599 F.2d at 1184-87. The discussions in each of these cases focuses on the touchstone of due process in an injunctive action as articulated by Mr. Justice Harlan Fiske Stone in Hansberry v. Lee, 311 U.S. 32, 42 (1940). Due process is satisfied if the procedure adopted "fairly insures the protection of the interests of absent parties who are to be bound." In each of these cases, the

courts of appeal rejected the argument that due process necessarily requires individualized notice of the pendency of the action.

This, then, is the proper focus: Did the procedure followed by the District Court reasonably insure that the interests of absent parties would be adequately protected? When the issue is postured in this fashion, there can be little question about the sufficiency of the form of notice utilized in this case. After all, adequacy of representation of the class is a mandatory requirement for the maintenance of a class action under Rule 23. The District Court, in this case, certified that the named plaintiffs did adequately represent the class of Mexican-American public school children attending school in Tucson School District No. 1. Moreover, during the course of the litigation, the District Court was asked to reconsider its earlier

decision and, instead, recertified the class as representative of the interests of all class members. Finally, after the District Court rendered its opinion and findings of fact and conclusions of law, Petitioners sought the establishment of a subclass within the Mexican-American class, alleging that their views were not adequately represented by the class representatives. The Court denied Petitioners' request. None of these rulings are challenged by Petitioners in this Court.

Any question about the adequacy of the representation of the views of the members of the Mexican-American class at the remedial stage should be satisfied by a consideration of the manner in which the District Court allowed full amplification of the issues that might arise either out of the implementation of the desegregation plan or the settlement. The steps taken by the

District Court are set forth in the Response submitted to this Court by the School District and need be only briefly summarized here. Hearings were held in advance of the approval of the plan and of the settlement. At each of those hearings, interested citizens were invited to appear and testify. At each of those hearings, Petitioners, and others who shared their views, were given a full opportunity to address the court, and counsel were given an opportunity to examine and cross-examine witnesses about those issues. Both of the questions as to which Petitioners say the class notice was inadequate were fully addressed and were treated by the District Court in its orders approving the plan and the settlement. Nowhere has it been suggested, nor on this record do we think it could be suggested, that any particular concern of Petitioners (including, specifically, the issues with respect to school

closings or dismissal of counts in the Mexican-American complaint) were not fully addressed. In sum, there is no basis on this record for contending that the manner of notice given failed in any way to afford protection of the interests of absent class members.

The approach to notice articulated in Hansberry, and as developed in the several courts of appeal decisions cited above, provides a sensible framework. By its very nature, a class action that seeks injunctive and declaratory relief from a public entity will necessarily have an impact on a class of people broader than the named plaintiffs. As a practical matter, those persons who are affected by the judgment of the court cannot "opt out" of the affected class. Since the judgment will affect their interests, any notice must be tailored to assure that the court will have

before it a full development of the views of the members of the affected class. As the Court of Appeals stated: "In a class action seeking a structural injunction, notice is intended to encourage those with divergent views to come forth, helping the trial court to identify possible inadequacies in the settlement." 623 F.2d at 1351. Petitioners do not contend, and we think could not contend, that the trial court in this case was deprived of the opportunity to hear a full range of the views of all interested parties. Expensive and time-consuming individual notice by mail of the proposed settlement would not have changed the issues before the District Court or added any material input to the decision-making process. Under the circumstances, we do not think it can be fairly contended that the District Court abused its discretion in deciding to authorize

notice by publication in local newspapers and through the broadcast media, supplemented by notice given in other ways. See Note, Developments in the Law--Class Actions, 89 Harv. L. Rev. 1318, 1566 (1976). This was the last phase of a protracted lawsuit that had regularly received wide coverage in the press and electronic media. No one familiar with the often vocal and extensive exchanges during the hearings on the settlement plan and the desegregaton plan could reasonably contend that all aspects of the case, the settlement and the plan were not being properly presented and considered.

Indeed, to impose an inflexible, blanket requirement of individual notice by mail or otherwise in all actions involving Rule 23(b)(2) structural settlements would, we think, effectively preclude settlements in numerous instances because of the logistical impracticability and the financial

burden associated with such a form of notice where, as here, the class members number in the tens of thousands. Given the nature of the issues and the relief sought in such actions, it surely cannot be said that due process principles require such an inflexible and sometimes anamolous rule.

Because there is no conflict among the Circuits and because the due process principles are well developed and understood and because they were fully satisfied and addressed here, we think the petition for writ of certiorari should be denied.[1/]

[1/] It should be noted that the due process analysis embraced by the courts cited above is the same analysis embraced by the Advisory Committee in its consideration of the proposed revisions to the Federal Rules of Civil Procedure in 1966. See 39 F.R.D. 69, 106-07 (1966). It is also the approach recommended by the authors of the two major treatises on Rule 23. See 7A Wright & Miller Federal Practice & Procedure § 1786 (1972); 3B Moore, Federal Practice § 23.55 (1980).

II. Whether Notice Omitting Specific Reference to School Closures Denied the Class Due Process of Law.

What has been said above disposes as well, we think, of this issue. Two points should be remembered. First, as explained in detail in the Response submitted by the School District, the question of school closures was fully considered. Petitioners had an opportunity to address the District Court with respect to those closures, and did so. Second, the issue of school closures was considered by the District Court in its review of the desegregation plan. The District Court disposed of that issue, and it was, therefore, not open to renewed debate merely because reference to the plan was made in the subsequent settlement of the remaining issues in the litigation. In any event, this question presents no issue of overriding importance beyond the facts of this particular case. Nor is

there any reason to believe that even if Petitioners were successful in obtaining a remand of this matter to the District Court the school closures issue would be resolved in any way different from which it has been resolved. The question of school closure was extensively debated and ultimately resolved. The schools in question have now been closed for more than two years, and there is no reason on this record to expect that that decision was improperly reached or should be reconsidered.

III. Whether Notice Omitting Reference to Dismissal of the Quality of Education Counts in the Mexican-American Complaint Denied the Class Due Process.

What has been said above disposes of this issue as well. No question worthy of this Court's consideration is presented here. The question of dismissal of the so-called "quality of education counts" was fully considered by the District Court, and

no claim has been made (nor do we think one could be made) with respect to the adequacy of the representation offered by the Mexican-American plaintiffs on this issue. The notice of settlement of this class action satisfied fully the requirements developed in the controlling lower court cases. It presented "a fair recital of the subject matter and proposed terms" of the settlement. Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir. 1977). See also Grunin v. International House of Pancakes, 513 F.2d 114, 112 (8th Cir. 1975), cert. denied, 423 U.S. 864 (1976). As the Court of Appeals correctly concluded, "the notice generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." 623 F.2d at 1352. Although the notice itself did not contain--and

could not have contained--a detailed description of all of the terms of the settlement, it did advise interested parties where a full description of the stipulation of settlement could be obtained, and any questions that any interested class member may have had concerning the settlement could have been cleared up merely by obtaining a copy of that stipulation. Moreover, the District Court was aware at the time of the settlement hearing, as was class counsel, that the "quality of education counts" were essentially mooted by intervening events, and thus there is nothing of substantive significance to this claim by Petitioners. Under the circumstances, we believe there is no issue here worthy of consideration by this Court.

IV. Whether Inclusion of Attorneys' Fees and Reimbursement of Costs to Class Counsel in the Stipulation of Settlement Necessarily Renders the Settlement Unfair.

Petitioners' argument that the settlement of the remedial issues in the District Court is inherently unfair because the School District agreed to pay class counsel a sum for attorneys' fees and reimbursement of costs as part of the settlement is both factually and legally without merit, and certainly, under the circumstances of the instant case, does not warrant review by this Court.

As a preliminary matter, it is important to note that class counsel were entitled to the recovery of attorneys' fees and the reimbursement of costs as a result of the District Court's Decision and Order of June 5, 1978, establishing liabilty on the part of the School District. Bradley v. School Board of Richmond, 416 U.S. 696 (1974); 20 U.S.C. § 1617; 42 U.S.C

§ 1988. At the settlement hearing, class counsel introduced into evidence attorneys' time records and expense reports in support of the fees and costs to be paid by the School District under the stipulation of settlement. No objection was ever made to these exhibits, and no argument was ever presented, or indeed could have been presented, that the fees and costs were excessive or unwarranted. Nonetheless, the District Court fully considered this issue and even observed that class counsel had expended a total of more than eleven thousand hours in the course of the litigation. (Transcript of Trial Court Proceedings, Vol. V, August 31, 1978, p. 916.)[2/]

[2/]The District Court also stated:

> "[T]he representation as to the hours shown in that exhibit appear to be in keeping with some of my earlier comments here today [that] the time and effort expended

More importantly, the record adequately reflects that the attorneys' fee and cost provision was included in the stipulation of settlement at the request of the School District, that it was negotiated and included as the last item after all other aspects of the settlement had been agreed upon, and that no concessions were made in the course of settlement negotiations in return for attorneys' fees. Indeed, the letters passing back and forth between class counsel and counsel for the School District during the settlement discussions indicate clearly that payment of attorneys' fees and reimbursement of costs was discussed "in response to [the School Distict's] request. Moreover, these

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Footnote No. 2 Continued:

> on this case . . . have been fantastic. It doesn't appear that any stone has been unturned." (Transcript of Trial Court Proceedings, Vol. IV, August 30, 1978, p. 740.)

letters indicate clearly that class counsel sought to divorce the attorneys' fee question from the stipulation of settement, but were unable to do so. As the letter of July 19, 1978 (Petitioners' Appendix T)[3/] states:

> "With respect to attorneys' fees and costs . . ., we would like to state at the outset that we do not believe that these matters should preclude a settlement." (July 19 letter at p. 3.)

Class counsel then goes on to state in that same letter:

> "As pointed out above, . . . we do not believe that [the attorneys' fee] issue should preclude a settle-

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[3/]These letters were produced to Petitioners' attorneys prior to the settlement hearing but were never admitted in evidence. Nevertheless, they were submitted to the Court of Appeals in Petitioners' Excerpt of Record, have been submitted to this Court in Petitioners' Appendix, and have been extensively referred to and quoted in Petitioners' Petition. We think, therefore, that reference to these letters in this Response is both necessary and appropriate.

> ment. Thus, if the [School] Board is unwilling to reconsider its [original] offer, we suggest that a viable alternative might be to divorce this issue from our current settlement discussions and submit the issue of recovery of attorneys' fees and costs to Judge Frey under traditional recovery principles in cases such as this." (July 19 letter at p. 4.)

In short, we think the record indicates that the inclusion of the attorneys' fee provision in the stipulation of settlement did not in any way compromise the interests of the class and does not render the settlement unfair to Petitioners or other members of the Mexican-American class. The School District sought agreement on attorneys' fees and costs as part of its desire to resolve <u>all</u> remaining aspects of the lengthy litigation. Without the inclusion of that provision in the settlement agreement, a settlement may not have taken place and the classes would have then been

deprived of the extensive benefits that flowed from the settlement. Under those circumstances, the Court of Appeals was quite correct, we think, in finding that the District Court acted properly in approving the settlement with the attorneys' fees and costs provision included.

In any event, all of the courts of appeal that have addressed this issue agree that the inclusion of attorneys' fees in a settlement agreement does not necessarily render a settlement unfair or invalid. In re General Motors Engine Interchange Litigation, 594 F.2d 1106, 1131 (7th Cir. 1979), cert. denied, 444 U.S. 870 (1979); Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3rd Cir. 1977). And this should be particularly true where, as here, the attorneys' fees are not a part of a negotiated settlement fund which might arguably be diminished to the extent of the

fees paid to class counsel. Moreover, the courts agree, as did the Ninth Circuit in this case, that where a government agency that has no stake in the attorneys' fee issue participates in the settlement negotiations and other proceedings leading up to the settlement, as did the United States Department of Justice in the instant case, that participation serves to protect the interests of the class against possible improper dealings and is to be given great weight in assessing the fairness of the settlement. Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1178 (9th Cir. 1977); Note, Developments in the Law--Class Actions, supra, 89 Harv. L. Rev. 1318 1563 (1976).

Stated simply, there is no reason for this Court to impose a blanket rule invalidating class settlements that encompass attorneys' fees and costs, there is no

evidence of unfairness or impropriety as a result of the inclusion of the attorneys' fees and costs provision in the stipulation of settlement in the instant case, and there is no reason for this Court to review the matter anew in light of the close scrutiny and consideration given to it by the Court of Appeals and the District Court below.

V. Whether the Two-Fold Hearing Approach Used by the District Court in the Instant Case to Consider Objections to the Proposed Remedial Plan of the School District and Separate Objections to the Settlement of Other Issues Denied the Class Due Process.

The Responses submitted by the School District, the United States and the Mexican-American Plaintiffs address this issue in some depth, and we therefore adopt the discussions set forth in those Responses as our response to this issue.

Suffice it to say, however, that this issue, as raised by Petitioners, is based

largely on erroneous assumptions and factual mischaracterizations. The hearings held by the District Court gave Petitioners and the classes in general a full and complete opportunity to present evidence and make arguments in opposition to the plan of desegregation and the settlement of remaining issues. In any event, the opinion of the Court of Appeals indicates that this issue was thoroughly examined and discussed below, and there is, therefore, no need for this Court to further review the issue, particularly since the issue has no particular significance outside of the peculiar facts of this case.

CONCLUSION

For these reasons and for the reasons set forth in the Responses of the School District, the United States and the

Mexican-American Plaintiffs, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States, am employed in the County of Maricopa, State of Arizona, in the offices of Martori, Meyer, Hendricks & Victor, A Professional Association, and am a member of the bar of this Court. My business address is Thirty-Fifth Floor, Valley Center, Phoenix, Arizona 85073. On January 5, 1981, I served the within:

BRIEF IN OPPOSITION BY RESPONDENTS
ROY AND JOSIE FISHER, ET AL.

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No. 80-759

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al.,
Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT No. 1, et al; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., ROY and JOSIE FISHER, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

Page

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... 2

1. The District Court's Decision on the Mexican American Class' Claims..... 2

2. Benefits Obtained for the Mexican American Class in the Settlement Agreement..... 5

3. Petitioners had extensive notice and fully participated in all remedial proceedings.. 7

REASONS TO DENY THE WRIT..... 9

A. Petitioners Present No Significant Questions of Law.... 9

B. Petitioners Suffered No Injury From The Omission From Judicial Notice of Explicit Language About School Closures and Dismissal of Non-Assignment Counts..... 11

1. The School Closures..... 12

2. The Non-Assignment Counts..... 14

CONCLUSION..... 15

TABLE OF AUTHORITIES

Page

Case

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).....10

Other Authority

Rule 23 (c), (d)(3), F.R.C.P..... 9

Rule 23(e), F.R.C.P.....12

No. 80-759

IN THE

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OCTOBER TERM, 1980

ALBERTO SANCHEZ, et al.,

Petitioners,

vs.

TUCSON UNIFIED SCHOOL DISTRICT No. 1, et al.; UNITED STATES OF AMERICA; MARIA MENDOZA, et al.; ROY and JOSIE FISHER, et al.; SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Maria Mendoza, et al., and their class of Mexican American students and parents of Respondent Tucson Unified School District No. 1, submit this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioners Alberto Sanchez, et al.

STATEMENT OF THE CASE

The proceedings below and pertinent facts are, for the most part, accurately set out in the Brief in Opposition filed by Respondent Tucson Unified School District (hereinafter the "School District") and in the opinion of the Court of Appeals.[1] The Mendoza Respondents adopt those statements. We add here several additional points necessary to proper consideration of the questions advanced by Petitioners.

1. The District Court's Decision on the Mexican American Class' Claims.

In its exhaustive and detailed decision on the merits entered June 5, 1978, after full trial, the District Court ruled against the Mexican-American plaintiffs' claims in almost every respect. It found insufficient evidence to support the allegation that the defendant School District had ever operated a dual system which segregated Mexican American students

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[1]App. 4-16, 623 F.2d 1338, 1341-43.

on the basis of race.[2] Of the nine schools whose present racial composition was found by the Court to be a product of past segregative acts, six reflected a segregated dual black-white system and the District's failure to dismantle that system; in only one cluster of three schools did the Court find actionable discrimination resulting from segregative acts against Mexican Americans.[3] The latter three schools have adjacent attendance zones and the evidence of segregative acts essentially involved manipulation of attendance boundaries among

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[2]Decision June 5, 1978, p. 211, ¶49. In contrast, the court found that until 1951 defendants had maintained a dual system which segregated black students on the basis of race, and had failed to dismantle that system fully. Decision of June 5, 1978, pp. 41-42, ¶¶1-16, p. 209 ¶13, p. 212-13 ¶21, p. 222 ¶56.

[3]These schools are Manzo, Brichta, and Tully Elementary Schools. Among the other six schools, where defendants' segregative acts were directed against blacks only, are the three--Roosevelt and University Heights Elementary Schools and Spring Junior High School--whose closure sparked Petitioners' objections.

the three schools.[4] The Court's decision therefore afforded no basis for desegregation remedies based on past segregation of Mexican American students anywhere in the School District outside a small, three-school area.

The District Court also heard extensive evidence on claims other than the main student assignment issue, as an adjunct to that issue,[5] and ruled against plaintiffs on those claims involving allegations of faculty hiring discrimination, discriminatory implementation of bilingual education and other special minority-oriented programs, and discrimination in curriculum, materials and discipline.[6] The Court's decision therefore found facts which precluded relief on any of plaintiffs' claims other than segregated student assignments.

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[4]Decision of June 5, 1978, p. 223 ¶59, pp. 87-88, ¶¶91-95, pp. 125-127 ¶¶8, 11-13.

[5]See Tr. Vol. IV, pp. 489-91.

[6]Decision of June 5, 1978, p. 169 ¶55, p. 170 ¶1, p. 172 ¶¶20-21, p. 167-68 ¶¶45-49, p. 168 ¶50, pp. 168-69 ¶¶52-54.

2. Benefits Obtained for the Mexican American Class in the Settlement Agreement. The Stipulation of Settlement provided substantial benefits for the Mexican American class, at slight cost in litigative opportunities foreclosed. The settlement provided for desegregation of three predominantly Mexican-American schools not included among the nine in which the Court found actionable violations, and therefore not subject to mandatory desegregation except by settlement.[7] The settlement also imposed on defendants a mandatory process of parent and neighborhood consultation with regard to three other schools, each about 90% Mexican American, which defendants had been free to close or otherwise dispose of after the June 5 decision finding no actionable segregation at those schools.[8] Finally, the settlement assures

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[7]Borton and Holladay Elementary Schools, and Utterback Junior High School.

[8]Davis, Drachman, and Carrillo Elementary Schools. Decision of June 5, 1978, pp. 221-22, ¶¶53, 58, 59. Defendants planned to close some or all of those schools. As a result of the consultation process, all remain open and are the subjects of revitalization efforts.

that non-minority children share, to a substantially equal degree, the transportation and reassignment burdens incident to desegregation.

The Mexican American class also derives benefit from the non-assignment provisions of the decree, including: mandatory provisions of affirmative action employment practices for hiring, placement, and promotion of Mexican American teachers, administrators, and professionals[9]; a uniform non-discriminatory student suspension and expulsion policy[10]; elimination of discriminatory testing instruments[11]; and a pilot reading program experiment sought by some Mexican American parents.[12] While several settlement provisions expressly provide for participation or review by black representatives,

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[9] App. 134 ¶11.

[10] App. 135 ¶13.

[11] App. 135 ¶14.

[12] App. 137 ¶16.

testimony at the settlement hearing confirmed that the inclusive language of those provisions covers Mexican Americans as well, and that many of the specific remedies first extended to blacks by the settlement were already afforded Mexican Americans by the Title VI Compliance Agreements which remain in effect between the School District and the U.S. Department of Health, Education and Welfare.

In obtaining these benefits of settlement, little was given up that had not already become unattainable. The closure of three minority schools had been proposed by the School District and approved by the Court--as a desegregation remedy, not as a compromise settlement. App. 79-84, 114-116; App. 22-27, 623 F.2d 1345-46, 44-45, 623 F.2d 1350. The chance to litigate the "quality education" counts successfully had vanished with entry of the Court's findings of fact in the June 5 decision. See p. 4, supra.

3. Petitioners had extensive notice and fully participated in all remedial proceedings.

As the District Court noted in its August 14, 1978 Order, there was a "great

amount of local publicity concerning all prior orders and proceedings in this case" (App. 106). In addition to the extensive press coverage of all stages of the case, during June and July 1978 the School District publicly announced and debated its desegregation options, including the disputed closures. The options were discussed at a series of well-attended, fully reported public meetings. By August, in preparation for the Rule 23 settlement hearing, Petitioners had solicited support "door-to-door" (App. 116), at shopping centers, and in other ways that caused widespread actual notice of school closures as well as terms of the proposed settlement. The widespread actual notice received by class members is confirmed by the appearance of some 30 witnesses and 121 petition signatories in the Court's review proceedings (App. 116-18).

The District Court patiently heard all the objecting class members and other concerned members of the public. Throughout the four days of hearings on Petitioners' motion for sub-class certification, the School District's desegregation plan, and the proposed settlement, the majority

of the witnesses were Petitioners' and persons who supported them. Most of their testimony concerned the contested school closing. See App. 77-78, 84, 115-119. While the District Court may not have heard all persons whose support Petitioners might have solicited given more time and more individualized notice, the Court heard every type of argument and evidence that could be made on Petitioners' behalf.

REASONS TO DENY THE WRIT

A. Petitioners Present No Significant Questions of Law.

Petitioners cast their five questions in procedural terms, apparently recognizing that this Court's certiorari jurisdiction is invoked for important questions of law, not to resolve factual disputes. Yet, as procedural issues, the matters raised by Petitioners go to the nuts-and-bolts of judicial supervision and notice of class action settlements. Such detailed matters are properly reserved to the discretion of the district courts, subject of course to overriding principles of due process. Rule 23(c), (d)(3), Fed. R. Civ. P. In the exercise of that discretion, trial judges are encouraged to utilize their

expertise and practicality in administering Rule 23 both flexibly and fairly. Nowhere is the need for flexibility and practicality more urgent than in the post-trial settlement of a complex school desegregation case. Here, the Court of Appeals found that the District Judge had, in every respect, given "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950), and had otherwise properly exercised its Rule 23 discretion. This Court's further review of the mechanics of notice and settlement used in this case would illuminate no significant legal issues.

Petitioners' assertions of procedural issues are merely tactical ploys in their attack on the substance of the Court's desegregation Order of August 11, 1978, and its Order approving the parties' Stipulation on August 31, 1978. Since objectors and other class members in fact had full notice and opportunity to be heard on these matters, Petitioners' procedural arguments

in effect invite this Court to re-examine the Constitutional adequacy of the desegregation order and the fairness of the settlement. We address those unstated issues below--but first we note that nothing about them warrants this Court's review on certiorari.

B. Petitioners Suffered No Injury From The Omission From Judicial Notice of Explicit Language About School Closures and Dismissal of Non-Assignment Counts.

Although the notices ordered by the Court did not in clear terms state that three schools were to be closed and non-assignment counts of the complaint would be dismissed under the proposed settlement, Petitioners and other class members were not prejudiced by this omission. Actual notice of these terms was provided in a timely manner by non-judicial means: press coverage, School District publicity, and the efforts of Petitioners themselves. The District Court had before it, and considered, all possible objections to both the desegregation plan and the later settlement. Petitioners and their supporters had every opportunity to present their

positions and evidence, yet failed to convince the Court. The reason for their lack of success is manifest: both the desegregation order and the court-approved settlement were not merely acceptable, but amply protected and benefitted class members' interests.

1. The School Closures.

The School District's decision to desegregate Roosevelt, University Heights, and Spring (and a number of adjacent schools) by closing the three schools was justified and beyond Respondents' power to prevent.[12] The District Court correctly reviewed the closure decision as a desegregation plan presented by defendants, under the test of whether the means chosen to desegregate were themselves constitutional and effective. App. 80-82; App. 22-27, 623 F.2d at 1345-46. The District Court did not have to review the closures under a Rule 23(e) test of "fairness" or "adequacy" to the class, since they were adopted by remedial order rather than by settlement. Nevertheless, it painstakingly

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[12]These schools have not been closed for over two years, since September 1978.

reviewed the justifications for closing each school, reciting site deficiencies, roofing problems, inadequate classrooms, dangerous street crossings, and similar factors. App. 87-96. It concluded that the schools' students, as well as the School District, would be well served by closures and reassignments.

In these factual circumstances, the Mendoza plaintiffs had no chance of preventing closure of the three schools. The constitutional mandate to desegregate both them and other nearby schools was served by closure. Plaintiffs did not agree in advance to the closures; they subsequently acquiesced by opting to gain other benefits for the class through settlement rather than pursuing a hopeless appeal from the desegregation plan. Those other benefits include desegregation of several schools not within the Court's June 5 order, protection of other schools from probable closure, and protection of minority interests in allocating the burden of desegregation. See pp. 5-7, supra. Without the settlement, none of these benefits would have been attainable, since the necessary underpinning for remedial actions--the

finding of constitutional violations--was absent, see p. 2, supra. The settlement, therefore, conceded little or nothing, and accomplished much, in benefitting the class with respect to student assignment decisions including school closures.

2. The Non-Assignment Counts.

While plaintiffs had attempted to withhold from adjudication issues other than the principal student assignment claim, much evidence underlying those claims was necessarily adduced by all parties in litigating the main segregation issue. In its June 5 opinion, the District Court entered findings of fact on that evidence which effectively disposed of plaintiffs' claims. See p. 4, supra. At that stage, no viable legal claim on these issues remained to the class. Moreover, the rights and opportunities of Mexican Americans with regard to the "quality education" issues were already safeguarded by Title VI compliance agreements entered into by the School District and HEW as this litigation moved toward trial. Those compliance agreements specifically addressed the linguistic and other needs of the District's Mexican American children.

The settlement agreement approved by the District Court preserved these advantages to class members and assured other benefits, including continued implementation of the same affirmative action employment policies which had greatly accelerated Mexican Americans' hiring and promotion after suit was filed. See p. 6, supra. On these counts, as on student assignment, plaintiffs ceded nothing of significant value in the settlement and obtained substantial benefits for the class.

CONCLUSION

The procedures utilized by the District Court in approving the settlement of this case were proper. The settlement was adequate and fair to members of the class, including Petitioners. The Petition should be denied.

DATED: December 31, 1980

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-759

ALBERTO SANCHEZ, et al

Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al,; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT TUCSON UNIFIED SCHOOL DISTRICT NO. 1's BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the fourteenth amendment require individual mailed notice of a proposed post-judgment post-remedy settlement in a school desegregation case involving only injunctive relief?

2. Did the Ninth Circuit err in determining that the contents of the notice of settlement in this case fairly apprised class members of the contents of the settlement and that the notice did not violate Petitioner's due process rights?

3. Did the Ninth Circuit err in upholding the post-judgment settlement in this case because the settlement included provision for payment of attorney's fees?

4. Did the District Court properly approve, after hearing, the School

District's proposed remedial plan in this school desegregation case; was notice given to the class members of this hearing, and is such notice necessary; and, must this remedial plan, after being adopted by the District Court, be subject to relitigation at a later settlement hearing?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PREFATORY NOTE	vii
RESPONDENT TUSD #1'S STATEMENT OF FACTS AND OF THE CASE	2
REASONS WHY THE WRITS SHOULD BE DENIED	9
I. PETITIONER HAS NOT PRESENTED TO THIS COURT ANY SPECIAL OR SUBSTANTIAL REASON TO GRANT REVIEW ON WRIT OF CERTIORARI. . . .	10
A. The Ninth Circuit's Decision Below is Not in Conflict With Other Circuit Courts of Appeal Opinions	10
B. The Ninth Circuit's Decision in This Case Does Not Conflict With Any Opinion Rendered by This Court	14
II. IN HIS ATTEMPT TO CONVINCE THIS COURT TO ACCEPT REVIEW BY WRIT OF CERTIORARI, SANCHEZ REPEATEDLY MISSTATES FACTS AND ASKS THIS COURT TO DRAW INFERENCES FROM THE EVIDENCE WHICH ARE UNWARRANTED AND ARE IN DIRECT CONFLICT WITH THE TRIAL COURT'S DETERMINATION AND THE DECISION RENDERED BY THE COURT OF APPEALS	15

A. The Plan is Separate From the Settlement 17

B. Class Members Were Given Notice of the Plan Hearing and School Closures. 18

C. The Settlement was Not Unfair to Members of the Mexican-American Class 19

D. Every Issue concerning Alleged Segregation in Tucson Public Schools was Fully Litigated. 21

E. Summary 23

III. THE DESEGREGATON PLAN, WHICH INCLUDED THE CLOSURE OF THREE SMALL INNER-CITY SCHOOLS, CONSTITUTED A COURT ORDERED REMEDY RATHER THAN A PORTION OF THE SETTLEMENT AND WAS NOT AN ISSUE TO BE CONSIDERED AT THE SETTLEMENT HEARING 24

IV. THE MANNER OF NOTICE OF THE SETTLEMENT HEARING SPECIFIED BELOW DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS 39

V. THE SETTLEMENT SHOULD NOT BE OVERTURNED MERELY BECAUSE IT INCLUDES PROVISION FOR PAYMENT OF ATTORNEYS' FEES 47

SUMMARY 54

APPENDIX (under separate cover)

TABLE OF AUTHORITIES

	Page
CASES	
Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980) .	11, 12, 13, 49
Board of Curators v. Horowitz, 435 U.S. 78 (1978)	41
Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970)	24
Chlupsa v. Posvic, 113 F.2d 375 (7th Cir. 1940)	13
City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974). .	42
In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir.) cert. denied 444 U.S. 870 (1979)	49
Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976) .	42
Robertson v. National Basketball Assoc., 72 F.R.D. 64 (S.D.N.Y. 1976), aff'd. 556 F.2d 682 (2d Cir. 1977)	42

United States v. Armour & Co.,
402 U.S. 673 (1971) 39

United States v. ITT Continental Baking Co.,
420 U.S. 223 (1975) 39

United States v. Swift & Co.,
286 U.S. 106 (1932) 39

STATUTES AND RULES

Rule 17, Rules of the Supreme Court of the United States . . 10

Rule 23, Federal Rules of Civil Procedure. 29

PREFATORY NOTE

This Brief in Opposition shall cite to the Petitioners' Appendix as "Pet. App.," followed by the appropriate portion and page of the Appendix, and in similar fashion will cite to the Appendix filed herewith as "Res. App.," again followed by the portion and page thereof.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-759

ALBERTO SANCHEZ, et al

Petitioners,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT TUCSON UNIFIED SCHOOL DISTRICT NO. 1's BRIEF IN OPPOSITION

Respondent Tucson Unified School District No. 1 (referred to herein as "TUSD #1") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Ninth

Circuit's decision in this case. That opinion is reported at 623 F.2d 1338.

RESPONDENT TUSD #1'S STATEMENT OF FACTS AND OF THE CASE

This litigation was commenced in May, 1974, by Respondents Fisher, et al, seeking desegregation of Respondent TUSD #1's elementary and junior high schools and improvement of the quality of education for black students in those schools. Several months later, a separate action was filed by Respondents Mendoza, et al, seeking desegregation and education changes on behalf of Mexican-American students in TUSD #1's elementary, junior high and high schools.

After several years of discovery, a consolidated trial of the Fisher and Mendoza actions was held in January, 1977, before the Federal District Court

for the District of Arizona (referred to herein as the "District Court", or when the context permits the "Court"). On June 5, 1978, the District Court issued its Order, Findings of Fact, and Conclusions of Law. The Court found that TUSD #1 had failed to properly dismantle its former dual school system for blacks and non-blacks and that it had continued since 1954 to discriminate against black elementary and junior high school students through a series of acts and decisions designed to maintain and foster segregated schooling for blacks. The Court further found that no dual school system ever existed with respect to Mexican-Americans and rejected the claim that TUSD #1 had discriminated against Mexican-Americans at the high school level. Finally, the Court concluded that

only nine schools then suffered current effects of TUSD #1's past intentionally segregative acts. The Court ordered TUSD #1 to prepare a "proposed plan of desegregation" (referred to herein as the "Plan"), with respect to those nine schools only, "to commence with the beginning of the 1978-79 academic year, if possible." Pet. App. B, at 62.

TUSD #1 was also required by the District Court to consult with the Plaintiffs' attorneys and members of the Plaintiffs' classes with respect to the Plan for these nine schools in an effort to minimize objections to the Plan. Pet. App. C, at 66-8. Any remaining objections were to be submitted to the Court by Plaintiffs by August 2, 1978. Id. at 67.

The District Court scheduled a hearing on the School District's Plan for August 8, 1978, (hereinafter the "Plan Hearing"), and indicated that any member of the community would be permitted to appear at this hearing and present testimony or other evidence in opposition to, or in support of, the Plan. Id. at 69-71.

Post-trial motions were filed by the Plaintiffs Fisher and Mendoza, as well as the Plaintiff-Intervenor United States of America, seeking to convince the District Court that it had applied an incorrect standard in determining which schools within the District suffered present effects of past intentional segregation. Before the District Court ruled on these post-trial motions, the parties informed the Court that they were in the process of discussing not only a mutually

acceptable plan for desegregation of the nine schools, but also a formal settlement agreement for resolution of all other pending issues, including the matters raised in the post-trial motions. Accordingly, the Court--at the suggestion of the parties--held in abeyance its decision on those motions. The Court also ordered, however, that notwithstanding these discussions between the parties, TUSD #1 was to submit to the Court its proposed Plan of desegregation by the July 17, 1978, deadline. Pet. App. C.

TUSD #1 filed its proposed Plan as required on July 17, 1978. Res. App. II. Petitioner Sanchez, through his counsel, filed formal objections to the Plan. The Plan Hearing was held as scheduled on August 8 and 9, 1978. Evidence and

testimony was presented in favor of the Plan, and members of the community were given the opportunity to, and did, speak in support of or against the proposed Plan.

On August 11, 1978, the District Court entered an order adopting the Plan as the first phase of its desegregation remedy, consistent with its order of June 5, 1978. Pet. App. E. The Court found the Plan, including school closures, to be constitutionally adequate. Id.

Subsequent to the time that the Court rendered its August 11 Order, the parties filed documents evidencing a settlement of all the remaining issues (referred to herein as the "Settlement"). Pet. App. J. The Court scheduled a hearing for August 24, 1978, to consider the Settlement. Pet. App. D. As a

result of a request by Sanchez, this hearing was delayed until August 30 and 31, 1978 (referred to herein as the "Settlement Hearing"). Pet. App. G, at 108.

At the conclusion of the August 30 and 31 Settlement Hearing, the District Court entered an order approving the Settlement. Pet. App. I. On September 28, 1978, Petitioner Alberto Sanchez and other persons who opposed the Settlement[1] filed their notice of appeal, purporting to appeal from the August 31, 1978 Order and numerous earlier orders, including the August 11 Order approving the Plan. The Ninth Circuit's decision of June 27, 1980, affirmed all orders of the District

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[1]For convenience, Petitioners will cumulatively be referred to as "Sanchez".

Court, Pet. App. A, and Sanchez' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 11, 1980. Pet. App. K. Sanchez then filed, on November 10, 1980, his Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (referred to herein as "Petition"). The following is offered by TUSD #1 in response to Sanchez' Petition.

REASONS WHY THE WRIT SHOULD BE DENIED

I

PETITIONER HAS NOT PRESENTED TO THIS COURT ANY SPECIAL OR SUBSTANTIAL REASON TO GRANT REVIEW ON WRIT OF CERTIORARI.

In an attempt to convince this Court that important and special reasons are present which require review by writ of

certiorari of the Ninth Circuit's decision,[2] Sanchez alleges that it conflicts with a recent decision of the Seventh Circuit and with prior opinions of this Court. When Sanchez' arguments and the facts of this case are analyzed, however, it is apparent that there are no special or important, much less substantial, reasons indicating that review by this Court is either necessary or appropriate.

A. The Ninth Circuit's decision below is not in conflict with other circuit courts of appeal opinions.

On page 20 of his Petition, Sanchez argues that the Ninth Circuit's opinion

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[2]Rule 17, Rules of the Supreme Court of the United States, provides that review by writ of certiorari is granted only when there are important and special reasons therefor.

in this case is in conflict with the Seventh Circuit's decision in Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980). A review of Armstrong, however, indicates no conflict with the Ninth Circuit's opinion below.

In Armstrong, supra, the court affirmed in all respects settlement of a desegregation lawsuit involving the public schools of the City of Milwaukee. The settlement was submitted to the court after judgment on the merits but prior to any remedy being presented to, or ordered by, the district court. Contrary to Sanchez' suggestion, Armstrong did not discuss or resolve the issue of whether individual notice is constitutionally required in a post-judgment settlement of a desegregation lawsuit. While it is true that the notice of settlement in

Armstrong was delivered to all class members, Armstrong v. Board of School Directors, 616 F.2d at 310, the court did not hold, or even suggest, that the settlement would have been constitutionally deficient had an alternative method of notice been utilized.

The district court in Armstrong was faced with many of the same considerations presented to the District Court in this case. As stated by the court of appeals in Armstrong:

> The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims. As discussed above, settlement of this litigation was reached at a very late stage, after the issues had been clearly identified, liability and impact had been decided, and a massive record had been compiled. The district court found, and we

> agree, that the litigation had progressed to a point at which counsel and the court were fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. 616 F.2d at 325.

These factors, present in both Armstrong and the instant case, eliminate the need for an all encompassing rule requiring, in every case, individual mailed notice of a post-judgment settlement.

Not only is Armstrong easily distinguishable, but the Seventh Circuit has previously held that notice of compromise is not required where a class action suit has proceeded to judgment. Chlupsa v. Posvic, 113 F.2d 375, 376 (7th Cir. 1940). In addition, various circuits, including the Seventh Circuit, have considered the question of whether individual notice is required to commence class actions seeking injunctive and

declaratory relief. These cases, cited in the Response filed by Respondents Fisher, et al., uniformly hold that individual mailed notice is not required.

It is apparent that Sanchez' claim of conflicting results among the circuits is in error.

B. The Ninth Circuit's decision in this case does not conflict with any opinion rendered by this Court.

Sanchez has cited numerous opinions of this Court which have rejected notice by publication as constitutionally inadequate under the circumstances. Petition at 18. None of the cases cited, however, determines the type of notice required by the due process clause of the fourteenth amendment in a situation where (1) the settlement is executed after a full trial on the merits and after a remedy has been

ordered following a remedy hearing, and (2) the Plaintiffs in the underlying action sought an injunction rather than individual damages.[3] For this reason, the Ninth Circuit's decision is not in conflict with the cases cited by Sanchez or with any decision of this Court.

II

IN HIS ATTEMPT TO CONVINCE THIS COURT TO ACCEPT REVIEW BY WRIT OF CERTIORARI, SANCHEZ REPEATEDLY MISSTATES FACTS AND ASKS THIS COURT TO DRAW INFERENCES FROM THE EVIDENCE WHICH ARE UNWARRANTED AND ARE IN DIRECT CONFLICT WITH THE TRIAL COURT'S DETERMINATION AND THE DECISION RENDERED BY THE COURT OF APPEALS.

In his statement of the case, Petition at 1-16, and throughout his Petition, Sanchez presents many statements

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[3] It is difficult to imagine this procedural situation occurring in other than a class action desegregation lawsuit. Whether these unique circumstances will ever reoccur is at best speculative.

which are inaccurate or, at best, very misleading.[4] In addition, Sanchez draws inferences and conclusions from the evidence which are in direct conflict with the conclusions of the Ninth Circuit and the findings of the District Court. Sanchez asks this Court to draw these same inferences based on the very limited portion of the record contained in the Appendix to his Petition. Although TUSD #1 will make no attempt to discuss all or even most of the inaccurate or misleading statements contained in the Petition, it will direct this Court's attention to a

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[4]Additionally, because Petitioner retyped the materials contained in the Appendix to his Petition, many errors appear therein. This Respondent has endeavored to correct some of these errors in section XIV of its Appendix. No attempt was made to correct numerous spelling errors and it is probable that other errors are present that have neither been observed nor corrected.

few critical issues where Sanchez is in disagreement with the analysis of both the District Court and the Ninth Circuit.

A. The Plan is Separate from the Settlement

Sanchez repeatedly alleges in his Petition that the Plan submitted by TUSD #1 and approved by the District Court in its August 11, 1978, Order was a portion of the Settlement to be considered anew at the August 30-31 Settlement Hearing. Petition at 4, 5, 8-9, 10, 12, 28, 44, 45, 49. The Ninth Circuit and the District Court both held that the Plan was separate from the Settlement and not an issue to be considered at the August 30-31 Settlement Hearing. 623 F.2d at 1345-6. In view of the important nature of this disagreement, this issue is discussed in more detail below in section III of this Response.

B. Class Members were Given Notice of the Plan Hearing and School Closures

In addition to claiming that the desegregation Plan was a portion of the Settlement, Sanchez also argues that the Plan Hearing on August 8 and 9, 1978, was held without notice to the class. Petition at 8, 43, 51. This allegation, as Sanchez is fully aware, is inaccurate. Notice of the Plan Hearing was sent to parents of TUSD #1 students prior to the August 8, 1978 hearing.[5] Res. App. at I. This notice, in unequivocal terms, provided that (1) TUSD #1's proposed Plan included closure of specific schools, (2) a hearing would be held on August 8, 1978, to determine the constitutionality

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[5]Notice of this hearing was gratuitous, as the trial court judge had inherent power to implement a remedy without notice or hearing.

of the proposed Plan and (3) objections could be made to the Plan at the Plan Hearing by anyone desiring to do so. Id.

C. The Settlement was not Unfair to Members of the Mexican-American Class.

Sanchez attempts to convince this Court that the settlement was unfair with respect to the Mexican-American class. He states:

> Counsel for the Mexican-American class presented one witness in support of the proposed settlement. Her name was Olma [sic] Riggs and she testified that she had no place of residence, but lived in her Ford Pinto station wagon. Petition at 14.
>
> * * *
>
> A gross disparity in the benefits received [in the settlement] by the largest class emerges even without "close scrutiny" of the parties compromise. Petition at 36.

Sanchez' suggestion that the Settlement was unfair to the Mexican-American class is completely unwarranted.[6]

The Settlement required TUSD #1 to review and revise, if appropriate, minority enrollment in at least five schools which were not found by the District Court's June 5, 1978, Order to be operating unlawfully, but which historically had been predominantly Mexican-American. Pet. App. J, at 129-30. In addition, numerous witnesses testified on August 30 and 31 that the benefits resulting from many of the obligations imposed upon TUSD #1 in the Settlement would benefit Mexican-Americans as well as black students.

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[6]The Response filed herein by Respondents Mendoza, et al., addresses in more detail the issue of the Settlement's fairness vis-a-vis the Mexican-American class.

Res. App. X. Respondent TUSD #1's Appendix III duplicates three pages of TUSD #1's Brief before the Ninth Circuit containing just some of the benefits received by the Mexican-American class as a result of the Settlement. Sanchez' argument that the Settlement is unfair is simply untrue.

D. Every Issue Concerning Alleged Segregation in Tucson Public Schools was Fully Litigated.

Sanchez states on page 20 of his Petition that:

> The final compromise dismissed all claims alleging that the Mendoza class had been denied equal educational opportunities with prejudice and without a trial on the merits.

This statement and a similar statement by Sanchez on page 31 of his Petition are especially misleading. As the District

Court clearly recognized, this case involved one cause of action -- whether TUSD #1 was unconstitutionally discriminating against its students based on their race or ethnicity. Res. App. XII. The remaining "counts" in the complaint which were dismissed were adjuncts to and supported the primary discrimination issue and were not independent viable causes of action. An enormous amount of evidence was taken on every issue of each count of the complaint. As the District Court explained to counsel for Sanchez:

> [THE COURT]: And with the cursory examination, it should have been apparent that Count One of the plaintiffs in the Mendoza case, 74-204, was the crux of the complaint. Count One was the count that alleged the creation and maintenance of a tri-ethnic segregated system. Counts Two, Three, Four, Five, Six and Seven and Eight were

> merely adjuncts thrown in to support Count One.
>
> Now, the Court and counsel recognize this, that these matters weren't separate counts, weren't separate items to be litigated separate and apart from the main issue of discrimination or segregation, but that they were valid issues to be considered and valid issues on which evidence should be presented with respect to the main issue in the case, to-wit: Discrimination and segregation. Res. App. XII.

The District Court went on to note that evidence was presented on every count, including discriminatory tracking of students, inferior curriculum and facilities for minorities, discrimination in the hot lunch program, and failure to employ and promote Mexican-American staff. (Res. App. XII). Dismissal was an irrelevant formality.

E. Summary

Based on the limited portion of the record contained in his Appendix, Sanchez

asks this Court to evaluate the evidence and reach conclusions opposite to those reached by the District Court and the Ninth Circuit, both of which had the complete record before them. It would be particularly inappropriate to grant review under these circumstances. Cf. Carter v. Jury Commissioner of Greene County, 396 U.S. 320, 339-40 (1970) (Court reluctant to overrule factual determination of lower court).

III

THE DESEGREGATION PLAN, WHICH INCLUDED THE CLOSURE OF THREE SMALL INNER-CITY SCHOOLS, CONSTITUTED A COURT ORDERED REMEDY RATHER THAN A PORTION OF THE SETTLEMENT AND WAS NOT AN ISSUE TO BE CONSIDERED AT THE SETTLEMENT HEARING.

In an attempt to convince this Court that it should grant review of this case, and because he objects to the closure of three schools pursuant to the Plan,

Sanchez maintains that the Plan, and thus these school closures, were part of the Settlement rather than an event required by the District Court's August 11, 1978, Order. Petition at 4, 5, 8-9, 10, 12, 28, 44, 45, 49. The Ninth Circuit, however, correctly held that the question of school closure was resolved by the District Court's August 11, 1978, Order adopting the Plan, and properly was not the subject of discussion at the Settlement Hearing held August 30 and 31, 1978. 623 F.2d at 1345-6.

In his attempt to convince this Court that the Plan was a portion of the Settlement to be considered at the August 30-31 Settlement Hearing, Sanchez cites selective statements made by the District Court <u>after</u> the August 8, 1978 Plan

Hearing. This Court should not be misled by Sanchez' reliance on one or two sentences in the immense record which, when isolated and taken out of context, seem to suggest that a full opportunity to object to school closures might be possible at the Settlement Hearing. As the record clearly demonstrates, and as was correctly determined by the Ninth Circuit, the Plan--resulting in school closures--and the Settlement were separate, and further consideration of school closures was unnecessary after the District Court adopted and ordered implementation of the Plan by its Order of August 11, 1978.

The District Court's June 5, 1978, Order states that "Defendants shall propose a plan designed to eliminate any vestiges of racial and ethnic segregation

or discrimination . . . ." Pet. App. B, at 62. The document filed with the District Court on July 17, 1978, in response to this order was denominated DEFENDANTS' PLAN AND SUPPORTING MEMORANDUM. Res. App. II. This Plan was submitted by TUSD #1, not by any coalition of the parties or pursuant to the Settlement. Although the School District welcomed suggestions regarding formation of the Plan from other parties and their counsel, just as it welcomed input from the community , on neither July 12, 1978, when the Board of Education selected the preferred options, nor July 17, 1978, when the Plan was submitted to the

District Court had a settlement been executed by the parties.[7]

To allow the issue of school closures to be reviewed again at the Settlement Hearing would render meaningless the Plan Hearing on August 8 and 9, 1978, and the District Court's Order of August 11, 1978.

It is true that the Settlement filed August 11, 1978, incorporated the desegregration Plan as ordered into effect by the District Court's August 11, 1978, Order rendered earlier that same day. This, however, did not mean that the August 11 Order was subject to modification or review. The purpose of the

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[7]Final execution and filing of the Settlement did not occur until after the District Court's August 11, 1978, decision was rendered. The August 11, 1978, Order, Pet. App. E, was filed August 11 at 11:46 a.m. and the Settlement, Pet. App. J, was filed at 5:13 p.m.

Settlement Hearing was not to second guess or relitigate the District Court's prior Order. The August 11 Order was incorporated into the Settlement just as the Settlement could incorporate a statute or regulation, as a convenient method to present the complete remedial "picture" in one document.

Nothing in the record prior to the August 8 and 9, 1978, hearing could mislead Sanchez into believing that TUSD #1's Plan would be viewed as a Rule 23, Fed. R. Civ. Proc., class action settlement rather than a proposed judicial remedy, or that it would be subject to review again at any later time.

On August 7, 1978, during a hearing to discuss pending motions, counsel for TUSD #1 carefully explained the purposes of the scheduled hearings:

[MR. BRAMMER]

> All I've heard, Your Honor, is that people are opposed to the closing of schools. And if that's what we're talking about, this Court has identified tomorrow [August 8] as the date with which the School District can present evidence and people can suggest alternatives to the Court concerning the plan, then the Court has established the date of the 24th of this month [later changed to the 30th] for people to appear after notice and pursuant to Rule 23 concerning any settlement which finally gets filed with this Court. Res. App. IV.

Later in the same August 7 hearing, the District Court directly addressed the basic misunderstanding of Sanchez' counsel:

> MR. SALESE: Your Honor, . . . I think the Court has already set August the 24th for the time at which we deal with the plan, at least the school's plan.
>
> THE COURT: Well, no, we've designated tomorrow morning to

> deal with the desegregation plan. We set August 24th for the time to deal with the proposal or the settlement of this lawsuit and an opportunity for the members of the class to be heard on the proposed settlement overall. Res. App. V.

Considering the above statements, Sanchez' suggestion that he was misled by an ambiguous statement in an order issued three days after the Plan Hearing, Petition at 9, is clearly unpersuasive.

At the very beginning of the August 8 and 9 Plan Hearing, the court clearly delineated the purpose of that hearing:

> At the outset, I think the record should reflect that this is the time set for hearing on the defendants' proposed plan for desegregation pursuant to the Court's order. You may proceed. Res. App. VI.

Whenever the discussion drifted to matters not involved in the desegregation Plan but which were involved in the then

tentative Settlement, the Court was quick to note that the Settlement was not at issue in the hearing on the 8th and 9th of August, and that the Plan and Settlement were separate. For example, the following colloquy occurred between the Court and Mr. Pitt, a Tucson attorney and citizen who presented testimony at the Plan Hearing pursuant to the Court's Order.

> MR. PITT: . . . So what I am asking the Court to consider, in its wisdom, is that in looking at the stipulation and entering a final order in this matter - -
>
> THE COURT: Which, by the way, is not the scope or purpose of this hearing.
>
> MR. PITT: I understand that . . . Res. App. VII.
>
> * * *
>
> MR. PITT: I was just trying to find out what the intent of the stipulation was.

THE COURT: Well, perhaps they can give us both.

MR. SALTER: If he will come back on the 24th, Your Honor, we will define it for him.

THE COURT: And I think really that's the time when we should delve into that matter. What we're concerned with here now is Option Five [of the desegregation Plan] Res. App. VIII.

With another witness, the Court continued:

MRS. ENGLER: . . . The other thing I wanted to know is that, wouldn't it be just as valid, since both Safford and Spring are named in the Court order as having vestiges of segregative intent, . . . wouldn't the wording of paragraph number five in this document - -

THE COURT: Well, if you are talking about the settlement document now, we'll get into that matter in another hearing. What we are concerned with here is only insofar as it may relate to Option Five [of the desegregation Plan]. Res. App. IX.

In addition, despite the existence of a few ambiguous passages to which Sanchez repeatedly refers, the record is replete with references after August 8, 1978, indicating clearly the District Court's position that the August 11, 1978, Order was the final resolution of the issues presented by TUSD #1's proposed Plan. The District Court rejected subclass status to Sanchez on August 11, 1978, partly on the basis that it had just decided school closures on the merits. Pet. App. F, at 101. Eleven days later, on August 22, 1978, it granted Sanchez' discovery rights as to four different areas of inquiry, but denied discovery as to the issue of school closures because, in the District Court's words:

> . . . the desegregation plan adopted by the Court is now moot by virtue of the Court's Order of August 11, 1978. Pet. App. H, at 111.

At the August 30 and 31 Settlement Hearing, the District Court again recognized that the Settlement, although adopting the Plan, did not provide Sanchez with an avenue to relitigate the Court's August 11 Order. When counsel for Sanchez began to discuss the Plan, the District Court stated:

> [THE COURT]
>
> Well, let me disabuse your mind and cut this short. The Court has already ruled on that matter, and I'm not going to relitigate - - I'm not going to hear any more argument on it. So with respect to that, the Court has already heard and ruled upon that so don't dredge that up again. You've made your record on it and you are free to pursue your remedy on that matter. You are just wasting time now plowing that ground again.

MR. SALESE: Well, Your Honor, the problem I have - -

THE COURT: The problem you have is that you cannot seem to accept the fact that the ruling has been made on the desegregation plan. What we're concerned with now, and only with now is the settlement. Now, the fact that the settlement, in essence, adopts the Court's plan, that is of no consequence, really, insofar as the settlement is concerned. The Court independently made that determination. Now, if counsel want to accept it, that's fine; if they don't their remedy is to go to the Court of Appeals.

MR. SALESE: So as I understand it then from Your Honor, then the closure issue, the plans submitted are not part of the settlement?

THE COURT: The closure, insofar as the Court's order of desegregation is concerned, is not in issue. Res. App. XI.

In summary, Sanchez' assertion that the Plan and Settlement were inseparable is without merit.

The Ninth Circuit correctly recognized Sanchez' error in reasoning concerning the Plan Hearing in relation to the Settlement Hearing, stating:

> Many of Sanchez's complaints charging the District Court with failing to properly accommodate his objections to the school closures are grounded on a fundamental misunderstanding of the purpose of the plan hearing (August 8th and 9th) and the status of the school closure question following the August 11th order approving the desegregation plan. Sanchez's complaints that the school closure issue was not properly considered in the procedures surrounding the settlement hearing assume the continuing vitality of this issue after the August 11th order. What was and was not decided by the August 11th order, and what remained to be considered in the settlement proceedings, are determined by the law governing school desegregation remedies in the federal courts.
>
> When a federal court finds that a public school system operates in a manner infringing upon some students' federal

constitutional rights, the Court is empowered to prescribe a suitable remedy.

* * *

The hearing on August 8 and 9 was specifically and solely directed to the question of whether the District's desegregation plan remedied the constitutional violations found in the June 5th order, and whether it did so in a constitutional manner. The District Court's understanding of its role was consistent with the limited remedial jurisdiction of the federal courts in school desegregation cases. . . .

* * *

The Court's careful examination of the school closures determined that they would not place an undue burden on minority students. Finally, the District Court concluded that the proposed plans were 'acceptable remedies for the constitutional violations heretofore found.'

We believe the District Court properly perceived its role in reviewing the desegregation plan. The August 11th approval of the District's de-

> segregation plan was an independent judgment of the District Court conclusively deciding the permissibility of the plan, including the school closures, for the 1978-79 school year. 623 F.2d at 1345-6.

Sanchez' suggestion, Petition at 27, that United States v. ITT Continental Baking Co., 420 U.S. 223 (1975), United States v. Armour & Co., 402 U.S. 673 (1971), and United States v. Swift & Co., 286 U.S. 106 (1932), foreclose any result other than that the Plan was part of the Settlement, or that the Ninth Circuit "steadfastly ignored" these decisions is without merit. The record clearly demonstrates that the Plan was separate from the Settlement and the Ninth Circuit was correct in so holding.

IV

THE MANNER OF NOTICE OF THE SETTLEMENT HEARING SPECIFIED BELOW DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

Sanchez argues that his constitutional rights were violated by the manner in which notice of the Settlement Hearing was disseminated.[8] Without presenting to this Court an accurate portrayal of the factual situation before the District Court, Sanchez asks this Court to adopt a broad based rule requiring, under all circumstances, first-class mailed notice to effect a settlement of class action litigation under all circumstances.

This Court has never adopted an inflexible concept of due process requiring any specific manner of notice for the myriad of situations which can be

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[8]The issue of notice afforded Petitioners, its adequacy as to content and form, and the propriety of its dissemination is more fully addressed in the Response filed herein by the Respondents Fisher, et al., and the Respondent United States.

presented to a federal district court. The very nature of due process negates any concept of inflexible procedures universally applicable to every situation. Board of Curators v. Horowitz, 435 U.S. 78 (1978). Specifically, this Court has never required individual mailed or delivered notices where the purposes to be served by the notice and thus the requirements of the due process clause of the fourteenth amendment are adequately served by other means. Such is the situation in this case.

The purpose of a settlement hearing in cases involving structural injunctive remedies is to apprise the judge of enough facts so that he or she can determine whether the settlement is fair to all class members. Discovery rights

prior to hearing are properly limited to achieving this goal. City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974); Robertson v. National Basketball Assoc., 72 F.R.D. 64 (S.D.N.Y. 1976), aff'd 556 F.2d 682 (2d Cir. 1977). Similarly, if the judge is aware of sufficient facts so that he or she can make an informed judgment on the proposed settlement, the hearing may be eliminated completely. Patterson v. Stovall, 528 F.2d 108 (7th Cir. 1976).

Notice in such cases is provided in order to serve the same purpose as the hearing - - that is, to assist the trial court judge in determining if the settlement is fair and equitable to class members by allowing objectors to come forward. The notice can be disseminated in any reasonable fashion to achieve this purpose.

The District Court judge in this case was presented with the following situation:

1. The underlying lawsuit alleging unconstitutional segregation of public schools had been fully and vigorously litigated on the merits after years of discovery. The litigation resulted in the District Court's 204 page Order of June 5, 1978, and its 265 page Appendix to that Order.

2. The trial on the merits of this action involved a massive presentation of evidence, and as a result thereof, the trial judge was thoroughly familiar with the issues concerning segregation and desegregation in TUSD #1 and with the parties and their counsel. Res. App. XII.

3. TUSD #1 submitted to the District Court a proposed Plan to remedy the present effects of past discriminatory practices which the Court, in its June 5, 1978, decision, found then existed at nine TUSD #1 schools. Res. App. II.

4. A full hearing, after notice thereof, was held concerning TUSD #1's proposed Plan on August 8 and 9, 1980.

5. By Order dated August 11, 1980, the District Court determined that the Plan submitted by TUSD #1 was constitutional and ordered it to be implemented immediately. Pet. App. C.

6. Immediately after the District Court's August 11, 1980, Order issued, a Settlement resolving all remaining issues in the case and other matters was executed and filed. Pet. App. J.

As a result of his extensive involvement in this case, the District Court was in a unique position to review the adequacy of the Settlement. As he stated during the August 30-31, 1978, Settlement Hearing:

> [The Court:] As counsel have indicated, this case has gone on for a long time. All the main counsel in the case and the Court have been living with this case. We all considered literally thousands upon thousands of pages of testimony, depositions, exhibits in this case. We have a whole room full of evidence that was presented in this case. It took Court and counsel a couple of years to collate and to consider all of that matter. Res. App. XII.
>
> * * *
>
> . . . [T]he time and effort expended on this case, as I stated eariler have been fantastic. It doesn't appear that any stone has been unturned. Res. App. XIII.

Thus, the notice afforded was more than that necessary to allow the District

Court to review the fairness of the Settlement with respect to all class members.

The situation described above presents a sharp contrast to the usual class action settlement which (1) occurs prior to litigation on the merits, and (2) in many cases involves a determination of damages due each individual class member, often at the expense of all other class members. In the usual case, the trial judge is not in a position to gauge the merits of a proposed settlement to determine if it is fair to all members of the class. The unique procedural posture of this case militates against review by this Court.

The District Court Judge in this action was fully informed of all facts necessary to protect the interests and

constitutional rights of every member of the class. The notice given served its function, and Sanchez suggests no new arguments of which the District Court and the Ninth Circuit were not fully cognizant. Given the unusual procedural history of this case, Sanchez' broad-ranging allegations of error lose any illusory attractiveness they would perhaps otherwise present.

V

THE SETTLEMENT SHOULD NOT BE OVERTURNED MERELY BECAUSE IT INCLUDES PROVISION FOR PAYMENT OF ATTORNEYS' FEES

Sanchez asks this Court to overturn the Settlement and disrupt the ongoing process of desegregating various schools within TUSD #1 because payment of Plaintiffs' attorneys' fees was included

in the Settlement. Petition at 32-42. TUSD #1 believes not only that there is no merit to this contention, but also that the issue was adequately addressed and properly resolved by the Ninth Circuit's opinion.[9]

The propriety of inclusion of attorneys' fees in the Settlement hinges upon a determination of the reasonableness of the amount settled upon and the adequacy of representation provided to the class during the negotiations. If, as in the present case, the record indicates that the representation of the class was

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[9]The Response filed herein by the Respondents Fisher, et al. will address in more detail the propriety of including attorneys' fees in the Settlement of this action and the Response filed by the United States of America will discuss in more detail the appropriateness of the Ninth Circuit decision concerning this issue.

adequate and that the settlement was fair, then there is no error. In Re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1131-2 (7th Cir.), cert den. 444 U.S. 870 (1979).

The District Court in this case thoroughly reviewed the Settlement and found it to be fair and reasonable. Pet. App. I. The trial judge's extensive involvement with this case and familiarity with counsel for all parties cannot be ignored. See, Armstrong v. Board of School Directors, 616 F.2d 305, 319 (7th Cir. 1980) (in approving post-trial settlement of desegregation lawsuit which included payment of attorney's fees, court noted that the trial judge's "familiarity with the litigants and the litigation is a valuable asset which should not lightly be discarded.")

During the Settlement Hearing, attorneys for Fisher, et al, and Mendoza, et al, submitted to the District Court documentation evidencing approximately 11,000 hours of attorney and law clerk time and over $153,000.00 in out of pocket expenses. Res. App. XIII. Counsel for Sanchez chose not to examine counsel for Plaintiffs regarding attorney's fees although given the opportunity. In fact, counsel for Sanchez expressly stated that there was no dispute concerning the validity of the hours or costs submitted by the attorneys for the Plaintiffs. Id. Had Plaintiffs' counsel unfairly compromised their clients' interest in return for attorneys' fees, the District Court Judge would have perceived such a situation immediately because of his extensive

involvement over the long course of this litigation. To the contrary, the District Court commented favorably concerning the exhibit offered concerning fees and costs. Res. App. XIII, at 82.

The record contains no hint or evidence of collusion. Attorneys' fees were discussed at the insistence of TUSD #1, not Plaintiff's counsel, Pet. App. Q and R, because the school district wished to include all remaining issues in the Settlement. The letters of negotiation transmitted between the parties, and referenced by Sanchez in his Appendix, evidence an understanding among the parties that the issue of attorneys' fees could be separated from the other negotiations if no agreement could be reached as to amount, Pet. App. T, at 213, and

that attorney's fees were secondary to an overall settlement. Id.

If the Ninth Circuit had expressed general approval of simultaneous negotiation of attorneys' fees in a class action settlement, perhaps reason would exist for this Court to accept review of this case. The Ninth Circuit's decision, however, clearly disapproves such a procedure. 623 F.2d at 1352-3. Despite the general disapproval, after reviewing the complete record herein, the Ninth Circuit found that due to the unique circumstances present and "neutralizing elements" such as the Government's participation in the case, there was no error. 623 F.2d at 1353. The unique circumstances present in this case include the following:

1. The attorney's fees agreement and settlement negotiations occurred

post-trial and post-judgment;

2. 20 U.S.C. §1617 provided for payment of attorneys' fees to Plaintiffs' counsel regardless of the existence of a settlement;

3. The United States Government joined in and approved the Settlement; and

4. Sanchez did not contest the reasonableness of the amount of the attorney's fees or costs.

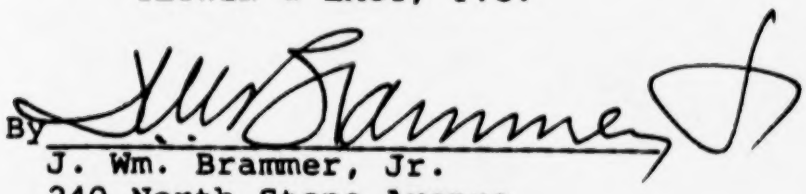
Under these circumstances, reversal of the District Court's approval of the settlement was properly deemed by the Ninth Circuit to be unnecessary and inappropriate. No policy or legal reason exists for this Court to overturn the Ninth Circuit's carefully reasoned decision on this issue.

SUMMARY

Sanchez' objections to the Ninth Circuit's decision are without merit, and, in any event, do not justify setting aside the efforts that every party to this lawsuit has expended for over the past two years to insure that the students in TUSD #1 receive equal educational opportunities as guaranteed by the fourteenth amendment to the United States Constitution. For the above reasons, Respondent TUSD #1 asks this Court to deny review of Sanchez' Writ of Certiorari.

RESPECTFULLY submitted this 29th day of December, 1980.

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.



By J. Wm. Brammer, Jr.

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No. 1

No. 80-759

In the Supreme Court of the United States

OCTOBER TERM, 1980

ALBERTO SANCHEZ, ET AL., PETITIONERS

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the due process guarantees of the Constitution require that individual notice of a settlement hearing be given to all readily ascertainable members of a plaintiff class, regardless of the efficacy of other forms of notice.

2. Whether the notice of the proposed settlement provided members of the plaintiff classes with sufficient information about the terms of the settlement to satisfy the requirements of due process.

3. Whether the district court improperly refused to consider objections to the previously approved desegregation plan at the settlement hearing.

4. Whether the district court was required to disapprove a proposed settlement of a class action solely because attorneys fees were negotiated as part of the settlement.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 14

TABLE OF AUTHORITIES

Cases:

Armstrong v. *Board of School Directors*, 616 F. 2d 305 7

Brick v. *CPC Intern, Inc.*, 547 F. 2d 185 12

Cafeteria Workers v. *McElroy*, 367 U.S. 886 6

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 8

Fowler v. *Birmingham News Co.*, 608 F. 2d 1055 6

Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271 10

Grunin v. *International House of Pancakes*, 513 F. 2d 114, cert. denied, 423 U.S. 864 ..... 6, 8

Gypsum Antitrust Cases, In re, 565 F. 2d 1123 ... 8

McDonald v. *Chicago Milwaukee Corp.*, 565 F. 2d 416 ..... 12, 13

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 ..... 6, 7, 8

Pettway v. *American Cast Iron Pipe Co.*, 576 F. 2d 1156, cert. denied, 439 U.S. 1115 ..... 10, 11

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Page

Cases—Continued:

Reynolds v. *National Football League*, 584 F. 2d 280 ..... 9-10, 12

Sosna v. *Iowa*, 419 U.S. 393 8

Sussman v. *Lincoln American Corp.*, 561 F. 2d 86 12

West Virginia v. *Chas. Pfizer & Co.*, 440 F. 2d 1079, cert denied, 404 U.S. 871 6-7

Statute and rules:

20 U.S.C. 3204 12

Fed. R. Civ. P.:

Rule 23 5

Rule 23(b)(2) 2

Rule 23(b)(3) 8

Rule 23(c)(2) 8

Rule 23(e) 8

OPINIONS BELOW

The opinion of the court of appeals is reported at 623 F. 2d 1338 (Pet. App. A). The findings of fact and conclusions of law of the district court are unreported (C.A.R. 2326-2816).[1] Orders of the district court pertaining to issues raised by the petitioners are also unreported (Pet. Apps. B-I).

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1980 (Pet. App. A), and an order denying a timely petition for rehearing was entered on August 11, 1980 (Pet. App. K). The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a constitutional challenge to the procedures leading to the district court's order approving settlement of a school desegregation case. The petitioners, twenty-nine individuals who are members of the Mexican-American plaintiff class, one of two plaintiff classes, contend that they were denied due process of law because: (1) the notice of the settlement hearing was inadequate; (2) the legality of the school district's desegregation plan, which the district court approved prior to the settlement hearing, was not open to attack at the hearing; and (3) the Mexican-American plaintiff class was denied fair representation and a fair and adequate settlement because attorneys fees for counsel for the plaintiff classes were negotiated as part of the settlement of the remaining issues in the case.

2. Tuscon School District Number 1 (hereinafter the District) and its governing officials were sued in May 1974 by the Fisher plaintiffs, black students and their parents, for operating a racially segregated school system (Pet. App.

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[1] "C.A.R." refers to the Record in the court of appeals.

4). Later that year, the Mendoza plaintiffs filed a separate complaint against the District on behalf of Mexican-American students (*ibid.*).[2] The Fisher plaintiffs and the Mendoza plaintiffs were certified as representatives of black and Mexican-American classes respectively and the cases were consolidated for trial (*id.* at 4-5).[3] Two intervenors entered the suit before trial: White parents opposed to busing (Sidney L. Sutton, *et al.*) intervened as defendants in the Fisher suit but not the Mendoza suit (*id.* at 5). The United States intervened as a plaintiff in both the Fisher and Mendoza suits in December 1976 (*ibid.*). After extensive discovery the case was tried in January 1977 (*id.* at 6).

On June 5, 1978, the district court entered voluminous findings of fact and conclusions of law (C.A.R. 2326-2816). The district court found that the District had failed to dismantle its dual school system for blacks and non-blacks and had continued to discriminate against blacks since 1954, but it found no unconstitutional segregation of Mexican-American students nor any evidence of intentional, system-wide discrimination against them (Pet. App. 6-7). The court ordered the District to devise plans for the desegregation of nine schools (*id.* at 6) to remedy the constitutional violation.[4] The District filed several plans for desegregating the nine schools identified in the court's June 5

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[2]The original Mendoza complaint, which alleged unlawful racial segregation, was later amended to include allegations of (1) maintenance of a tri-ethnic segregated school system; (2) discriminatory tracking; (3) inferior curricula and facilities for minorities; (4) discrimination in the hot lunch programs; (5) discrimination in special education programs; (6) failure to take into account bilingual differences; and (7) lack of bilingual notices (Pet. App. 6).

[3]Both classes were certified pursuant to Rule 23(b)(2), Fed. R. Civ. P. (C.A.R. 66-67, 3837). The two classes together contained approximately 18,500 students (Pet. App. 118).

[4]The order also required the parties to take reasonable steps to insure that residents of the school district and class members knew of the

order, indicating which options it preferred (Pet. App. 8-9). The district court held hearings on the District's proposed desegregation plan on August 8 and 9 (*id.* at 12).[5] The court concluded that the District's preferred plan was adequate to remedy the constitutional violation it had found and approved the District's desegregation plan on August 11, 1978 (*id.* at 13).

3. Petitioner Alberto Sanchez became actively involved in the case after the District filed its desegregation plans. He objected to the plans because they called for the closure of three predominantly Mexican-American schools which, he felt, would unfairly burden some members of the Mexican-American class (Pet. App. 11). On July 27, 1978, Sanchez moved the court to substitute counsel for himself and a class he wished to represent (Pet. 6).[6] The district court ordered substitution of counsel for Sanchez and his children (*ibid.*).[7]

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contents of the proposed desegregation plans and had an opportunity to participate in the selection among them (Pet. App. 66-67). The order invited residents of the school district to address written comments to the court on any proposed plans and made provision for residents of the school district to be heard in open court concerning their objections or alternative suggestions (*id.* at 68-70). The District filed a report with the court prior to the hearing on the plan detailing the efforts it had made to publicize the plans (Pet. App. M).

[5]Petitioner Sanchez and defendant-intervenors Sutton, *et al.* lodged their objections to the proposed desegregation plans and presented alternatives (Pet. App. A13). Counsel for the United States and the Fisher and Mendoza classes did not cross examine witnesses or propose alternative plans because they had tentatively agreed to support the District's proposal pending approval of a settlement (*id.* at 12-13).

[6]Sanchez requested substitution of his own counsel for the Mendoza class counsel because of his dissatisfaction with Mendoza counsel's acquiescence in the school closures (Pet. App. 11).

[7]Sanchez also moved the district court to create a subclass of Mexican-American parents and children residing in the attendance zones of the three schools that were subject to the closure proposal (Pet. App. 11-12). The district court heard argument on the motion but

4. On August 4, 1978, four days before the hearing on the desegregation plan, the parties advised the district court that they had reached a settlement (Pet. App. 9). The proposed settlement was filed with the court on August 11, 1978 (Pet. App. J). It included, *inter alia*, the desegregation plan previously approved by the district court; it provided for parental involvement in the alteration of student assignment patterns, non-discrimination in suspension, expulsion, and student placement testing, the reassignment of black faculty in certain schools and the creation of a pilot bilingual reading program. The settlement also provided that the District pay counsel for the plaintiffs $500,000 in attorneys fees and costs. On August 14, 1978, the district court approved the settlement notice to class members (Pet. App. 14). Petitioner Sanchez was given the opportunity to obtain discovery on each element of the settlement, but not on the terms of the desegregation plan which had already been approved by court order. The court held a settlement hearing on August 30 and 31 to determine whether the settlement was "fair, just and adequate" (*id.* 15). The court declined to permit reexamination of the merits of the desegregation plan because it had already determined its constitutional adequacy and approved it as a judicial remedy. After considering all of the testimony at the settlement hearing,[8] the district court approved the settlement finding it reasonable, adequate and fair to both the black and Mexican-American class members (*id.* at 123).

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denied it (Pet. App. F). This ruling was unsuccessfully challenged in the court of appeals; that challenge is not raised in this Court.

[8]Despite the court's stated desire to avoid testimony on the merits of closure of the schools, much of the testimony at the hearing centered on dissatisfaction with the closures (Pet. App. 116). The parties to the settlement supported the agreement (*id.* at A15). Counsel for Sanchez filed objections to the settlement (*ibid.*). He indicated he represented 21 objectors, seven or eight of whom appeared and testified (*id.* at

5. Petitioners appealed the district court's orders approving the District's desegregation plan and the settlement, and its other rulings regarding notice and opportunity for involvement in the hearings on the plan and the settlement. The court of appeals upheld the desegregation plan as an adequate remedy and concluded that the district court had not abused its discretion in approving the settlement. It held that the notice of the settlement hearing was constitutionally adequate to both as to form and content, and that because the district court's order approving the District's preferred desegregation plan was entered after the district court had independently assessed the constitutional adequacy of the plan, that court had correctly ruled that the plan was not a subject of the settlement hearing. Although the court of appeals disapproved the practice of negotiating attorneys fees as part of the settlement in a class action, stating "we strongly discourage the simultaneous negotiation of attorneys' fees and substantive issues in class action settlement negotiations" (Pet. App. 58), it concluded that the settlement, including the fees, was fair, and that under all the circumstances, the settlement should not be set aside just because it contained a provision for attorneys fees.

ARGUMENT

Rule 23 of the Federal Rules of Civil Procedure sets forth certain procedural requirements for managing class actions, which are designed to assure that any divergent interests of class members are adequately accommodated. District courts have broad discretion in managing the litigation and settlement of class actions to enable them to respond to the

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App. 117). Eleven class members testified in opposition to the settlement and the court received six letters opposed to it (*ibid.*). Additionally, some of the objectors obtained approximately ninety signatures on a petition listing objections to the proposed settlement (*ibid.*). The district court noted that the objectors totalled 121 out of two classes comprised of 18,500 students (*id.* at 118).

particular needs and circumstances of each case. As the court of appeals noted, petitioner challenges "the District Court's choices of how the required procedures were to be implemented" (Pet. App. 21), and the district court was in a better position than the appellate court to assess the adequacy of notice and the overall fairness of the settlement because of its long involvement with the case (*id.* at 37). The settlement occurred after a lengthy trial on liability, issuance of voluminous findings of fact and conclusions of law and hearings on the remedy and on the settlement (*id.* at 31-32). In sum, the petitioners have simply failed to demonstrate, either in the court of appeals or in their petition in this Court, that the procedures the district court chose to employ were prejudicial or inadequate, still less that those procedures were so faulty as to deny them due process of law. Moreover, the court of appeals applied the principles of law as set down by this Court, and the decision below is not in conflict with any decision of any other court of appeals. Thus, there is no reason for this Court to grant plenary review.

1. In arguing that the notice of settlement was inadequate, the petitioners do not show that notice was ineffective or that the district court was unaware of relevant facts or objections at the hearing on the settlement. Instead, they urge this Court to rule that the Constitution requires that in order to settle a class action "[i]ndividual notice must * * * be mailed to each person whose identity and whereabouts are readily ascertainable." (Pet. 18). The court of appeals' refusal to adopt such a per se rule is consistent with previous decisions of this Court (*Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-315 (1950)) and with the decisions of other courts of appeals (*Grunin* v. *International House of Pancakes*, 513 F. 2d 114, 120-123 (8th Cir.), cert. denied, 423 U.S. 864 (1975); *Fowler* v. *Birmingham News Co.*, 608 F. 2d 1055 (5th Cir. 1979); *West Virginia*

v. *Chas. Pfizer & Co.*, 440 F. 2d 1079, 1090-1091 (2d Cir.), cert. denied, 404 U.S. 871 (1971)).[9]

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co., supra*, 339 U.S. at 314. Whether publication or other forms of notice of a settlement hearing afford due process depends on the "practicalities and peculiarities of the case" (*ibid.*). Here the notice of the settlement hearing was published in English and Spanish in two Tucson newspapers for approximately a week before the settlement hearing and notices were distributed widely throughout the community, although not mailed to each individual.[10] The court of appeals carefully reviewed the form of notice that was given and the indicia of its effectiveness using the due process standard set forth in *Mullane* v. *Central Hanover Bank & Trust.*[11] It observed that the district court was aware of the widespread local publicity (Pet. App. 49),

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[9]Contrary to petitioners' assertion, *Armstrong* v. *Board of School Directors*, 616 F. 2d 305 (7th Cir. 1980), is not in conflict with the decision here (Pet. 20). In *Armstrong*, the court of appeals simply noted that notice of a settlement in a school desegregation case was sent to all class members and published in newspapers; it did not consider whether individual notice was constitutionally necessary (616 F. 2d at 310).

[10]For the first three days of publication the notice appeared in the fine print used for legal notices, but for the remainder of the time it appeared in standard type and was highlighted with a black border (Pet. App. 14 n.3). Copies of the notice were distributed to community groups and to merchants and churches in the class members' neighborhoods and were made available to local radio and television stations (*id.* at 14, 49). The district court's order approving the notice remarked that there was a "great amount of local publicity concerning all prior orders and proceedings" (*id.* at 49).

[11]The court of appeals found that "[a]ll members of the class necessarily lived within the Tucson School District No. 1, an area served by newspapers carrying the notice, and were subject to all of the additional publicity generated by the suit" (Pet. App. 49).

and it concluded that "there was widespread actual notice of the settlement and the hearing as a result of the published notice and other sources, and a number of class members did in fact come forward to object. It being reasonably concluded that this form of notice would be effective, and with the subsequent indications that it did in fact reach large numbers of the class, we find no abuse of discretion or violation of due process in the form of notice provided" (*id.* at 50-51).

The petitioners' reliance on *Mullane* v. *Central Hanover Bank & Trust Co., supra,* and *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974), for the proposition that individual mailed notice of a settlement hearing must be given whenever practical is misplaced. In *Mullane,* this Court ruled that notice simply by publication in a New York newspaper denied due process to known beneficiaries of a common trust fund, many of whom resided outside of New York, because it was not reasonably calculated to apprise the beneficiaries of the initiation of litigation which could deprive them of substantial property interests in the common trust fund. In contrast, this case involves notice of a proposed settlement of a highly publicized class action seeking injunctive relief on behalf of a geographically concentrated class of individuals, whose interests were represented by counsel during all phases of the four-year period of litigation that preceded settlement. Notice by publication was found to be improper in *Eisen* because it was a Fed. R. Civ. P. 23(b)(3) class action governed by the special notice requirements of Rule 23(c)(2), designed to inform class members of the pendency of the class action. Those notice requirements are unique to Rule 23(b)(3) class actions, which involve property interests similar to those at stake in *Mullane.*[12] *Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at

[12]The individual notice requirement articulated in *Mullane* was incorporated in Rule 23(c)(2) when it was revised in 1966. *Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at 173-174.

177 n.14; *Sosna* v. *Iowa*, 419 U.S. 393, 397 n.4 (1975). In contrast, Rule 23(e) (which governs notice of proposed settlements of class actions) vests the district court with discretion to determine the form of notice "subject only to the broad 'reasonableness' standards imposed by due process." *Grunin* v. *International House of Pancakes, supra*, 513 F. 2d at 121; see also *In re Gypsum Antitrust Cases*, 565 F. 2d 1123, 1126-1127 (9th Cir. 1977).

2. The petitioners argue that the desegregation plan was part of the settlement in this case and that therefore its provisions should have been set forth in greater detail in the notice of the settlement hearing[13] and the plan should have been subject to review at the settlement hearing. But both the district court (Resp. TUSD App. XI, Tr. Vol. IV 480)

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[13]Specifically, petitioners argue that the notice of settlement should have stated that three schools would be closed as part of the desegregation plan. The fact that the desegregation plan was not a part of the settlement disposes of the argument that the notice should have provided greater details of the desegregation plan. Moreover, each resident of the school district was mailed an English/Spanish newsletter just three weeks before the trial court approved the settlement notice (Pet. App. 169). It set forth the details of the District's preferred desegregation plan and identified the three schools to be closed (Resp. TUSD Br. 18; Resp. TUSD App. I).

Petitioners also claim that the notice was defective because it failed to specify that certain counts in the Mendoza amended complaint relating to the adequacy of education for Mexican-American students would be dismissed. Counts 2, 5, and 6 of the complaint were severed before trial because the Department of Health, Education, and Welfare had approved the District's compliance plan (Pet. App. 6). However, the severance was conditioned on the understanding that "all evidence presented during the course of trial * * * may be considered by the Court in any ultimate disposition of said counts" (C.A.R. 3995). The district court found "at the time of trial all of the District's educational services were in full compliance with federal standards" (*id.* at 2495). Thus, dismissal of these counts simply recognized the effect of that finding; it was acarcely a significant aspect of the settlement. In these circumstances, it was enough that the settlement notice warned class members of the binding effect of approval of the settlement (Pet. App. 163).

and the court of appeals (Pet. App. 22-24, 27) found that the desegregation plan was not part of the parties' settlement agreement, but was instead the independent result of the district court's approval of the plan submitted by the District. Thus petitioner's argument is simply an attack on the lower courts' factual findings that the plan was not negotiated as part of the settlement. They do not suggest any other basis for requiring reconsideration of the desegregation plan in the settlement hearing, and we are aware of none. See *Reynolds* v. *National Football League*, 584 F. 2d 280, 285 (8th Cir. 1978); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F. 2d 1156, 1168-1170 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979). Absent "a very obvious and exceptional showing of error" (*Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949)), which is not present here, this Court will not interfere with concurrent findings of fact of two lower courts.

Those findings are in any event correct.[14] The court of appeals, consistent with the approach taken by other circuits (see *Pettway* v. *American Cast Iron Pipe Co., supra*; cf. *Reynolds* v. *National Football League, supra*), considered the process by which the plan was created.[15] After a full trial on the merits of the unlawful segregation claim, the district court found that nine schools still suffered from the effects of past segregation, and ordered the District to pro-

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[14]Contrary to petitioners' claim (Pet. 43-44), it is not significant that the settlement agreement incorporated the provisions of the desegregation plan. The settlement was not filed until the court had approved the plan. Accordingly, it is scarcely surprising that the parties' agreement reflected the court's decision.

[15]In *Pettway*, the court of appeals observed that "[s]ettlements and court judgments are not distinguished by different platonic essences, but by the processes of their creation" (576 F. 2d at 1170). In this case the court of appeals properly focused on the process of approval of the desegregation plan, rather than the specific language used in the order approving the desegregation plan or the stipulation of settlement (*id.* at 1172).

pose a desegregation plan for those schools and submit it for review (Pet. App. 6-7, 62).[16] The court hold a hearing on the submitted plans at which "Sanchez and others" presented their objections to the proposed closings (*id.* at 39-40). The district court's order approving the District's plan shows that it carefully evaluated those objections before approving the plan (Pet. App. 84-85, 88). As the court of appeals noted, the trial judge was fully able to make an independent assessment of the constitutionality of the desegregation plan because of his thorough familiarity with the case (*id.* at 39 n.11).[17]

3. Petitioners argue that the settlement should be set aside because it was negotiated simultaneously with the provision for attorneys' fees for plaintiffs' counsel (Pet. 32-42). The court of appeals joined other circuit courts in condemning this practice on the ground that it frequently creates the appearance of impropriety (Pet. App. 58). The court held, however, that in the circumstances of this case, the settlement should not be set aside (*id.* at 60). The petitioners apparently urge adoption of a per se rule which would require nullification of any settlement when such

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[16]The district court did not engage in any negotiations concerning the content of the desegregation plan. Compare *Pettway* v. *American Cast Iron Pipe, supra*, 576 F. 2d at 1173-1174. Furthermore, the court of appeals found that "there is no evidence that the plan itself was a product of settlement negotiations" (Pet. App. 39 n.11).

[17]For example, the district court carefully analyzed the reasons for closing the schools and the impact the plan would have on students attending those schools (Pet. App. 85-96). It found that the reasons for closing the schools were non-racial: declining enrollment, inadequate sites and classroom sizes, and the need for extensive repairs and improvements. Moreover, it concluded that as a result of closing these schools minority students would attend more modern facilities with a broader range of educational programs.

The district court's familiarity with the facts of the case and the legal principles to be applied is also reflected in its voluminous findings of fact and conclusions of law at the liability stage of the case (C.A.R. 2326-2816).

negotiations have taken place.[18] No court has adopted such a rule; instead the court of appeals' more flexible approach is consistent with the decisions of other courts of appeals. See *Reynolds* v. *National Football League, supra*, 584 F. 2d at 285-287; *McDonald* v. *Chicago Milwaukee Corp.*, 565 F. 2d 416, 421-423 (7th Cir. 1977); *Sussman* v. *Lincoln American Corp.*, 561 F. 2d 86 (7th Cir. 1977); *Brick* v. *CPC Intern, Inc.*, 547 F. 2d 185 (2d Cir. 1976).

The court of appeals did not find any actual improprieties in the negotiation of the settlement (Pet. App. 57). Moreover, it concluded that in the particular circumstances of this case, there were sufficient factors to "neutralize the potential for impropriety" (*ibid.*). The Justice Department's involvement in the case since before the trial on the merits was "a significant factor in quieting the potential for unfair treatment of minority interests within the plaintiff's class. [*Marshall* v.] *Holiday Magic*, 550 F. 2d [1173] at 1178 [9th Cir. 1977]. See *Developments [in the Law—Class Actions*, 89 Harv. L. Rev. 1318,] *supra*, at 1563 [1976]" (Pet.

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[18]Petitioners do not contend that the fees awarded were excessive. Although they do suggest that the remedy negotiated for the Mexican-American plaintiff class casts doubt on the adequacy of their representation, they do not directly challenge the adequacy of the settlement here, nor did they challenge it below. In any event, the terms of the settlement do not support the contention that the Mexican-American class received substantially fewer benefits than the black class. Most of the provisions were equally applicable to both plaintiff classes (Pet. App. 129-133 paras. 4-8, 134, para. 11, 134-136, paras. 12-15, 138-139, paras. 17-19). Only three provisions were directed at a particular class (*id.* at 133-134, paras. 9, 10, (blacks), 16) (Mexican-Americans)). Moreover, the court had determined in the liability stage of the case that the District had not unlawfully segregated Mexican-American students and had not engaged in system-wide discrimination against them (Pet. App. 7). By contrast, it found that black students had been subjected to racial segregation, the effects of which continued after 1954 (*ibid.*). Finally, as the district court noted, it is of some significance in assessing the adequacy of the settlement that only 121 persons out of the

App. 59).[19] The court also found it significant that there is statutory authorization (20 U.S.C. 3204) for the award of attorneys' fees in cases such as this (Pet. App. 59).[20]

The district court here was in a particularly good position to judge the fairness of the settlement to all the plaintiff classes because of its long familiarity with the case. The settlement was achieved only after years of discovery, a full trial on the merits, a finding of liability, and a hearing on the constitutional adequacy of the District's desegregation plan. In addition, the district court took steps to insure that divergent views were represented when it appointed counsel to represent Sanchez, allowed discovery on issues pertaining to the settlement and held a hearing on the proposed settlement. See *McDonald* v. *Chicago Milwaukee Corp., supra*, 565 F. 2d at 422-423.

In sum, the court of appeals' approval of the simultaneous negotiation of attorneys fees and the settlement agreement turns on the particular facts of the case, in which there was neither any actual impropriety nor any significant potential for impropriety. The decision below scarcely

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approximately 18,500 members of the plaintiff classes objected to it (see note, 8, *supra*). Compare *Pettway* v. *Americam Cast Iron Pipe Co., supra*, 576 F. 2d at 1217-1218.

[19]Although the government lawyers did not participate in the fee negotiations, they did agree that the settlement terms were fair, and adequately protected the rights of all affected minority groups.

[20]In addition, although it emphasized that the potential for a conflict of interest does not depend on the existence of a common fund to be divided among class members, or even on claims for money damages, the court of appeals recognized (Pet. App. 56 n. 19) that the potential for conflict "may not be as great" where, as here, only injunctive relief is sought.

establishes any broad precedent favoring such simultaneous negotiations.[21] Accordingly, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

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[21] Indeed, the court warned (Pet. App. 57): "[i]t would rarely be an abuse of discretion for a trial court to reject a settlement proposal where such combined negotiation took place."

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-759

ALBERTO SANCHEZ, et al

Petitioners,

v.

TUCSON UNIFIED SCHOOL DISTRICT NO. 1, et al,; UNITED STATES OF AMERICA; MARIA MENDOZA, et al., SIDNEY L. SUTTON and SALLY SUTTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

		Page
1.	The Notice of Settlement Denied the Class Due Process	1
	A. Introduction	1
	B. The Law of Prejudgment Notice is Inapposite	1
	C. The Expense of Individual Notice is Neither Demonstrated nor Relevant	3
	D. Respondents Have Otherwise Failed to Justify Mailed Notice of Settlement	5
2.	Intervening Events did not "Moot" the Quality Education Counts	8
3.	Respondents have not Presented Meritorious Argument on the Simultaneous Negotiation of Fees and Class Interests	10
	A. Respondents' Entitlement to and the Amount of Fees Received are Irrelevant	10
	B. The Origins and Course of the Negotiations are Immaterial	12

Page

4. Seriatum Approval of Desegregation Plan Negotiated as Part of the Class Action Settlement is Improper 14

TABLE OF CITATIONS

CASES	Page
Armstrong v. Board of Directors, Etc., 616 F.2d 305 (7th Cir. 1980)	14
Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); 479 F.2d 1005 (2d Cir. 1971), vacated 417 U.S. 156 (1974)	4, 5
Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306 (1950)	3, 4, 6
Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169 (1978)	5
RULES	
Rule 23, Federal Rules of Civil Procedure	1, 2, 3, 9, 20

1. The Notice of Settlement Denied the Class Due Process.

A. Introduction.

The Fisher respondents defend the method of notification on grounds which were not addressed in the petition or the opinion below. These arguments and the principal contention of District No. 1 require a brief rejoinder.

B. The Law of Prejudgment Notice is Inapposite.

Respondents emphasize that notice of pendency is unnecessary in an action certified under Rule 23(b)(2). That, of course, is not the question presented here. If, they add, judgment is properly entered without such prior notice to the class, then a compromise may be approved absent individual notification of the settlement hearing.

The argument ignores the separate and distinct purposes served by Rule 23(c)(2) and (e). As petitioner's own authority

recognizes, notice of pendency is required by Rule 23(c)(2) in order that class members may exercise their right to withdraw from an action certified under 23(b)(3). Since the right to "opt out" is not enjoyed by members of a (b)(2) class, the notice requirement is limited accordingly.

The notice provisions of Rule 23(e) govern the dismissal or compromise of every action, however certified. The difference reflects the essential fact that settlement of class litigation, whatever its character, finally disposes of all substantive interests before the trial court. Respondents' attempt to defend published notice of settlement in a (b)(2) action on the ground that judgment could have been entered without the prior, individual notification necessary in a

(b)(2) context[1/] reduces to a non sequitur.

C. The Expense of Individual Notice is Neither Demonstrated nor Relevant.

In respondents' view, petitioners advocate an inflexible rule of notice imposing costs which would discourage settlements in large class actions. Mailed notice, however, need only be sent to those class members whose identity and whereabouts are readily ascertainable. Mullane, 339 U.S. at 318-19. That principle is neither inflexible in its application nor unduly burdensome. Here, the District routinely mailed material, other than the settlement notice, to all parents whose children attended its schools. The membership of the Mendoza and Fisher

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1/ The members of a (b)(3) class do not receive any prior notice, other than that required by Rule 23(c)(2), where final judgment is entered after trial.

classes totaled approximately 20,000 persons, a figure which appears modest for present purposes. Compare Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (individual opt-out notices required even though class included more than two million persons).

In any event, Mullane disposes of respondents' contention: Due process does not invariably require the expense of identifying or locating unknown persons so that they may receive individual notice of a proceeding in which they are interested. 339 U.S. at 317-18. As to those whose names and addresses are readily available, "however, notice by publication stands on a different footing".

> "Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties." 339 U.S. at 319.

This Court then imposed the requirement of mailed notice which respondents find so onerous.

D. Respondents Have Otherwise Failed to Justify Mailed Notice of Settlement.

Respondents suggest that published notice of settlement suffices where the class is adequately represented prior to the settlement hearing. This Court has squarely rejected their reasoning:

> "Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it." Eisen III, 417 U.S. at 176.

That conclusion is particularly apt here. Notice of settlement and a fairness hearing are designed to ensure that class members may scrutinize and, where appropriate, object to counsel's representation of their interests. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1169

(1978).

Respondents also note that class members appeared at the settlement hearing and informed the trial court of "common" objections to the parties' agreement. It does not follow that the notice provided here satisfied due process. In Mullane, this Court recognized that any objections to the accounting would necessarily be brought on behalf of all persons whose interests were before the trial judge. For that very reason, individual notice mailed to known beneficiaries was sufficient. As the Court empahsized, however, due process permitted no less. 339 U.S. 306.

Furthermore, respondents' contention ignores the disparate impact of the settlement. The compromise provided that certain schools would be closed immediately, the future of others reviewed and determined at a later date, and the balance

used subject to student transfers. Similarly, seven of the eight counts in the Mendoza Complaint were dismissed with prejudice, a proviso which did not concern black parents or their children. Given the diverse interests affected by the agreement, a discrete set of class-wide objections was never at issue. Mailed notice, on the other hand, was essential if only because the settlement did not have the same impact on the classes as a whole or their individual members.[2/]

2/ Respondents' argument implies that objectors appearing before the trial court somehow "represent" absent class members, a contention which is without support in fact or law. Because sufficient, timely notice of the settlement hearing was not provided, it certainly does not follow that all objections to the compromise were presented, much less developed, at the final hearing.

The District correctly observes that it mailed a newsletter dealing with the hearing on August 8 and 9 to all class members. Suffice it to note that the settlement encompassed the plan, which was the sole subject of that hearing, and an agreement on all other outstanding issues, including appeal rights, dismissal of quality education counts, attorneys' fees and provisions benefiting black children. Mailed notice of the first proceeding did not and could not constitute adequate notice of the settlement hearing itself.

2. Intervening Events did not "Moot" the Quality Education Counts.

According to respondents, the notice of settlement properly omitted reference to the provision dismissing the quality

education counts with prejudice.[3/] "Intervening events", which respondents fail to describe, rendered them "moot". The subject matter of certain counts was investigated by HEW officials, who found various remedial measures necessary. Counsel for the Mendoza class subsequently sought a stay of further proceedings in order that HEW might monitor the District's compliance with its requirements.

In doing so, counsel emphasized that the agency's action did not preclude litigation of the same issues. As HEW's own expert testified, the administrative

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3/ Their assertion that these claims were mere "make weights" included to bolster allegations of de jure segregagation are, of course, absurd. If, as respondents suggest, the dismissal set forth in the settlement was an irrelevant formality, they might at least note that the District Court had previously entered orders dismissing the counts without any notice to the class, a procedure which Rule 23(e) alone expressly prohibits.

compliance plan would provide a sufficient remedy only if the District implemented it fully. The United States did not adduce evidence at the settlement hearing with respect to the District's performance or its monitoring efforts. The dismissed counts also included claims which were not addressed by the compliance plan. In short, the quality education issues were anything but moot at the time of settlement.

3. Respondents have not Presented Meritorius Argument on the Simultaneous Negotiation of Fees and Class Interests.

A. Respondents' Entitlement to and the Amount of Fees Received are Irrelevant.

Respondents defend combined negotiations on the theory that federal law authorized a fee award here. The argument ignores the obvious: Where a class action seeks injunctive relief only, a settlement including attorney's fees simply could not

be negotiated unless it resolved some independent claim created by statute. Whether that resolution may be reached at the same time class interests are determined is the question presented.

The amount of the total award is equally immaterial for present purposes. As the cases on point have emphasized, the risk that class interests will be traded for fees inheres in simultaneous negotiations. Indeed, plaintiffs' counsel and the defendants are the sole beneficiaries of the practice. A rough relationship between the fee award recovered in the settlement and the amount which may have been due class counsel does not establish that they represented their clients' interests without the slightest regard for their personal gain. Adequate representation at the settlement stage and the Code of Professional Responsibility alike demand no less.

B. The Origins and Course of the Negotiations are Immaterial.

Respondents stress that the District, not class counsel, insisted on negotiating fees together with all other outstanding issues. Fisher adds that his lawyers sought to remove fees from the bargaining and that they were determined after all substantive matters were resolved.

Counsels' correspondence conclusively demonstrates that fees were a subject of bargaining from the very outset; only the final amount was decided at the conclusion of the process (Petitioner's Appendix Q, R, S, T & U, p. 189 to 240). It is that very procedure which the Circuits have repeatedly condemned. The attempt of Fisher's counsel to divorce fees from the negotiations was predictably rejected by the District. Since, as respondents now admit, a settlement might well have been

impossible without agreement on fees, [4/] plaintiffs' attorneys did not pursue the matter.

If as respondents claim, the District insisted on combined negotiations, it surely does not follow that all real or potential improprieties were eliminated from the bargaining process. The District's strategy ensured that it would retain an ongoing and substantial advantage over plaintiffs' attorneys, who were necessarily forced to choose between maximizing their personal gain and the benefits received by the class.

4/ That fact alone confirms the impropriety of combined negotiations. Resolution of issues affecting class interests should not depend on whether agreement can be reached on the amount due plaintiff's counsel. See Respondent Fisher's Brief in Opposition, p. 31 and 32.

4. Seriatum Approval of Desegregation Plan Negotiated as Part of the Class Action Settlement is Improper.

Respondents defend seriatum approval of the desegregation plan by asserting that petitioners either misunderstood or misstated the facts leading up to the approval of the plan and its relationship to the stipulation of settlement. Respondent Mendoza states that the "plaintiffs did not agree in advance to the closures;" (p. 3 of Mendoza's response); Respondent District states that "the record clearly demonstrates that the plan was separate from the settlement. . ." (p. 39 of District's response). None of the answering respondents have addressed the issue raised in the petition.[5/] Armstrong v. Board of Directors, etc., 616 F.2d 305 (7th Cir. 1980): If a remedial

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5/ Petitioners have not received a Brief in Opposition from the United States.

desegregation plan is negotiated as part of a settlement, may it be considered separately from the other provisions of the settlement? Crucial to that question is whether or not the desegregation plan was, in fact, part of the stipulation of settlement, both in form and content. Respondents urge it was not. Petitioners disagree. Petitioners support their position with the following undisputed facts.

On July 17, 1978 the District Court ordered the school district to present its plan to the Court by that same date, July 17th. In the same order, plaintiffs were given until August 2, 1978 to file any objections to or alternative plans and the hearing on the plan, objections thereto or alternatives was to be held on August 8, 1978, (Petitioner's Appendix C, p. 65-71). On August 4, 1978, the respondent District filed its "Report of All Defendants Other

Than Anita Lohr" stating as follows:

> "Pursuant to Order of this Court entered July 18, 1978, defendants submit this report to inform the Court of the activities of and proceedings before the school board since the defendants' plan was submitted on July 17, 1978. Additionally, as the Court has been informally notified by letter dated August 2, 1978, the defendants have reached a settlement of all issues with plaintiffs Fisher, et al., plaintiffs Mendoza, et al., and plaintiff-intervenor, subject to the provisions of Rule of Federal Procedure No. 23 and approval of the Court.
>
> One of the provisions of the settlement agreement is that, with respect to the Roosevelt, University Heights, Jefferson Park and Cragin group of schools, Option III as it is included within the materials submitted to the Court on July 17, 1978 would be agreed upon by the parties for the Court's approval. This option is different from the one (Option II) which was adopted by the school board as its preferred option for this group of schools. Other than that single difference, which is agreed to by the school board only as a part of the settlement, no alterations in the plan as submitted on July

> 17, 1978 is suggested by defendants." (Emphasis added. Petitioner's Appendix M, p. 167-168).

Also on August 4, 1978, the District Court entered the following Order:

> "A proposed settlement having been filed in these consolidated actions, it is necessary that the members of the plaintiffs' classes be given notice of the proposed settlement and an opportunity to object thereto or otherwise be heard thereon." (Petitioner's Appendix C, p. 73).

The District Court then went on to set August 24, 1978 for the hearing on the proposed settlement and ordered counsel to prepare a notice to the class. The District Court was aware before the August 8, 1978 hearing on the desegregation plan that the parties had reached agreement and that the agreement included the plan. The fact that the Court went ahead with the hearing on the plan and approved it separately from the overall settlement does not change the fact that the plan was

agreed to by the parties as part of the overall settlement. And, as the Ninth Circuit observed, at the hearing on the desegregation plan,

> "The school district presented testimony in support of the plan. Due to the settlement, neither the class representatives nor the government objected or chose to conduct cross examination, but thought to reserve such opportunity should the settlement be disapproved by the Court." 623 F.2d 1338, at 1342 and 1343.

Moreover, all the orders of the District Court concerning the desegregation plan and the settlement clearly reflect the District Court's understanding that the desegregation plan was agreed to by the plaintiffs below as part of the overall compromise (Petitioner's Appendix E, F and I). Nowhere in the record does the District Court indicate otherwise.

The correspondence among the counsel for the parties to the settlement expressly provides that the plan must be agreed to

as part of the compromise (Petitioner's Appendix S, T and U). Respondents offer nothing to controvert the record on this point, nor could they.

The Ninth Circuit has, therefore, condoned a procedure which permits class counsel to negotiate a remedial plan as part of an overall settlement, stand mute at any hearing held on the propriety of the plan leaving the class unrepresented and without notice of the proceedings. The remaining provisions of the settlement then are considered at a separate hearing. Such a practice offends due process and removes the stewardship of the litigation from the class to their counsel. The lawyers will not be living in the neighborhoods where the schools are closed, where the facilities are shoddy or where the curriculum is inferior. They cannot be trusted to adequately represent the class

unless the class is afforded the due process protection embodied in the processes dictated by Rule 23(e) of the Federal Rules of Civil Procedure. Minority parents and their children should receive the same protection as other litigants, surely not less.

Respectfully submitted this 16 day of January, 1981.

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An information service for the residents of the Tucson Unified School District

The Desegregation Decision

On June 5, U.S. District Court Judge William Frey ruled that nine of the Tucson Unified School District's 102 schools currently are suffering the effects of past discriminatory acts which violate the U.S. Constitution. The judge further ordered the district to submit a plan to desegregate those schools — to be implemented when school resumes in September.

On July 17, after numerous public forums, the school board submitted a proposed plan which board members feel complies with the judge's order and addresses the individual violations cited in his ruling. The board has until Aug. 4 to make amendments to its proposed plan, and has scheduled a study session for 7:30 p.m. Monday, July 31, at 1010 E. 10th St., to hear more from people involved in the schools affected by the court order.

The judge also has scheduled a hearing in his courtroom at 8:30 a.m. on Tuesday, Aug. 8, for those residents of the Tucson Unified School District who wish to register their objections or to suggest alternatives to the proposed plans in open court. (See story inside for details.)

The plan outlined in this issue of the TUSD News may or may not be the plan which will be implemented when school resumes Sept. 5. Judge Frey has indicated he will rule sometime in mid-August as to whether he will accept or reject the plan or make modifications.

The judge made 22 findings of fact with respect to the district's neighborhood school concept. These findings recognize a relationship between that concept and the district's attempt to dismantle its former dual system in 1951. The judge felt the neighborhood school concept may have been a necessary vehicle for dismantlement and for ensuring that the effects of a formal dual system did not continue.

In responding to the judge's ruling of Constitutional violations, the TUSD Board of Education divided the nine named schools into three natural groupings; Brichta, Manzo and Tully; Roosevelt, University Heights, Jefferson Park and Cragin; and Spring and Safford junior highs.

The remedies to be submitted to the court also could be divided into two categories: (1) the necessity to eliminate all vestiges of the past statutory segregation flowing from the existence of Dunbar (a former all-Black school) and (2) the duty to remedy any present effects of past segregative acts.

These present effects could be measured only by comparing what the racial or ethnic composition of a school would have been if segregative acts had not occurred.

(Continued inside)

and its effect on the Tucson Unified School District

District proposal would shift students from Brichta Elementary

In summary, all vestiges of Dunbar must be eliminated, whereas the present effects of segregation in the other schools must be cured by creating a racial or ethnic composition in the schools as if the segregative acts had not occurred.

In the Brichta, Manzo and Tully area, the judge ruled that these schools currently are experiencing effects of past discriminatory acts. The acts specifically identified by the court were (1) the timing of Brichta's original construction, (2) the drawing of Brichta's original attendance boundaries, (3) the adding of four permanent classrooms to Brichta in 1964 and (4) placing portables at Brichta in 1972 rather than using space at Tully to relieve Brichta's overcrowding.

Brichta currently is an ethnically balanced school, in terms of districtwide ratios. But this means Brichta has an Anglo majority in a geographical area of the district where most students are Mexican-American.

The judge suggested that if the discriminatory acts had not occurred, Brichta's ethnic composition would more nearly reflect its immediate geographic vicinity, and Manzo and Tully would have enrolled more Anglo students. The judge suggested, however, that students from outside these two immediate neighborhoods should have been assigned to Manzo and Tully, and did not imply that the district had caused the integral neighborhoods to be predominantly Mexican-American.

Also, both the Manzo and Tully neighborhoods meet the criteria established for neighborhood school attendance. That is, both schools are situated in the midst of a residential area defined by major thoroughfares and natural barriers within which students are able to walk to school.

The plan submitted to the court by the TUSD school board includes these considerations. The Manzo and Tully neighborhoods would not be altered by any boundary changes. Tully School would add that portion of the Brichta attendance area bounded by Ironwood Hills (Grant), Silverbell, Camino de Oeste and Goret, and the Manzo School would add that portion of the Brichta attendance area bounded by Greasewood, Speedway, Trail's End, Camino de Oeste and Ironwood Hills (Grant).

If Brichta students had been assigned to Manzo and Tully in the past, such an assignment probably would have taken place, with more students assigned to Tully than Manzo because of space considerations.

This plan would reduce Brichta to its immediate walk-in neighborhood plus Silverbell Terrace, a predominantly minority area. This also would remove the portables from Brichta which were part of the constitutional violation.

The students in the areas formerly designated as being assigned to Brichta would be reassigned to both Tully and Manzo schools, resulting in all three schools more closely meeting the student ethnic percentages in that geographic area of the district.

All children currently walking to Brichta, Manzo and Tully would continue to do so. Those children changing schools already are being transported, so additional student transportation would not be required. The distance traveled for the transported youngsters would increase slightly.

This plan would assign approximately 84 more Anglo children to Tully and about 54 more Anglo children to Manzo. The continuity of educational programs would not be affected and little staff assignment adjustment would be required.

This special summer edition of the TUSD News is being mailed to all families with children attending TUSD schools, in compliance with the judge's directions to inform the residents of the contents of the proposed plan.

Any questions about the plan or the judge's order may be directed to the office of Dr. Lee Starr, Assistant Superintendent for Community Relations, 791-6121.

More details on the desegregation issue will be included in the first regular issue of the 1978–79 TUSD News, scheduled for publication in mid-September.

Tully boundaries remain the same; add to Tully that portion of the Brichta attendance area bounded by Ironwood Hills (Grant), Silverbell, Camino de Oeste and Goret.

Manzo boundaries remain the same; add to Manzo that portion of the Brichta attendance area bounded by Greasewood, Speedway, Trail's End, Camino de Oeste and Ironwood Hills (Grant).

La propuesta del distrito transportará alumnos de la Escuela Primaria Brichta

El 5 de junio del corriente, el Juez William Frey de la Corte Federal por este Distrito determinó que nueve de las 102 escuelas del Distrito Escolar Unificado de Tucsón actualmente estaban sufriendo los efectos de actos discriminatorios anteriores realizados en desacuerdo con la Constitución de los Estados Unidos. Por consiguiente el juez dió orden que el distrito escolar presentará un plan para desegregar a las escuelas afectadas, el cual se realizara al resumirse la sesión escolar en septiembre.

El 17 de julio, después de numerosos foros públicos, el Consejo Regente Escolar presentó un plan que, a creencia de los integrantes del Consejo, conformara con la orden del juez y se dirigiera a las violaciones citadas en su dictamen. Al Consejo Escolar se le ha dado hasta el 4 de agosto para enmendar el plan propuesto y, de acuerdo con dicho plazo, ha fijado una sesión de estudio para el lunes, 31 de julio, a las 7:30 p.m., en el edificio administrativo, 1010 al este de la Calle 10, con el fin de más ampliamente escuchar los intereses de la gente involucrada en las escuelas afectadas por la orden de la corte.

El juez además ha fijado una audiencia en su corte a las 8:30 a.m., el martes 8 de agosto para darles oído a esos residentes del Distrito Escolar Unificado de Tucsón que quieran patentizar sus objeciones o proponer alternativas a los planes propuestos en sesión abierta de la corte. (Entérense de más detalles al respecto en otras secciones de este noticiero.)

No hay seguridad que el plan esquemado en esta edición del Noticiero TUSD sea el que se implementará al empezar las clases el 5 de septiembre. El Juez Frey ha declarado que dará su fallo a mediados de agosto con respecto a la aprobación o rechazo del plan o enmiendas que deban hacerse.

El juez hizo 22 determinaciones con respecto al concepto de la escuela de la vecindad fomentado por el distrito. Estas determinaciones reconocen una relación entre el concepto mencionado y la acción del distrito de "desmantelar apropiadamente" su sistema dual anterior de 1951. El juez reconoció que el concepto de la escuela de la vecindad podría haber sido un medio necesario para desmantelar y asegurar que los efectos de un sistema dual anterior no continuaran.

Al responder al dictamen del juez sobre violaciones constitucionales, el Consejo Regente del TUSD dividió las nueve escuelas nombradas en tres grupos dignos de trato separado: Brichta, Manzo y Tully; Roosevelt, University Heights, Jefferson Park y Cragin; y Spring y Safford.

Los remedios a presentarse a la corte también podrían dividirse en dos clases: (1) la necesidad de eliminar todos los vestigios de segregación estatutaria causados por la existencia de Dunbar (escuela anteriormente negra sólamente) y (2) el deber de remediar los efectos actuales causados por actos segregativos anteriores.

Los efectos actuales pudieran medirse sólamente al considerar cuál hubiera sido la integración racial o étnica de escuela alguna si los actos segregativos no hubieran sucedido.

En resumen, todos los vestigios de Dunbar y sus brazos tienen que eliminarse y mientras tanto los efectos actuales causados por la segregación tienen que ser remediados al establecerse una integración racial o étnica como que no hubieran sucedido actos segregativos.

Con respecto a la área de Brichta, Manzo y Tully, el juez determinó que dichas escuelas actualmente sufren los efectos de actos discriminatorios anteriores. Al respecto, los actos especialmente citados por la corte son los siguientes: (1) el suceso de la construcción original de Brichta cuando ocurrió, (2) la designación de la zona original de asistencia de Brichta, (3) la agregación de cuatro salones de clases permanentes a Brichta en 1964 y (4) la colocación de salones portátiles en Brichta en 1972 en vez de usar el espacio disponible en Tully para aligerar la demasía de alumnos en Brichta.

La escuela Brichta actualmente tiene nivelación étnica con respecto a las razones del distrito entero. Sin embargo esto quere decir que Brichta tiene una mayoría anglosajona en una área geográfica del distrito donde la mayoría de estudiantes son mexicoamericanos.

El juez indicó que si actos discriminatorios no hubieran sucedido, la composición étnica de Brichta se aproximaría más a reflejar su vecindad geográfica contigua o las escuelas Manzo y Tully hubieran matriculado un número mayor de alumnos anglosajones. El juez añadió, sin embargo, que los alumnos de fuera de estas dos vecindades contiguas deberían haber sido asignados a Manzo y Tully pero no implicó que el distrito había causado que las vecindades íntegras fueran mexicoamericanas predominantemente.

Además ambas vecindades de Manzo y Tully conforman los criterios establecidos para asistencia escolar de vecindad, es decir, ambas escuelas están situadas en medio de una área definida por arterias mayores de tránsito y barreras naturales dentro de las cuales los estudiantes pueden caminar a la escuela.

El plan propuesto a la corte por el Consejo del TUSD incluye las siguientes consideraciones. Las vecindades de Manzo y Tully no serían alteradas por cambios de confines. A la escuela Tully se le agregaría esa porción de la área de asistencia de Brichta confinada por la Ironwood Hills (Grant), Silverbell, Camino de Oeste, y Goret, y a la escuela Manzo se le agregaría esa porción de la área de asistencia de Brichta confinada por la Greasewood, Speedway, Trail's End, Camino de Oeste y Ironwood Hills (Grant).

Si se hubieran asignado los estudiantes de Brichta a Manzo y Tully en el pasado, tal asignación probablemente hubiera sucedido asignando más alumnos a Tully que a Manzo en vista de consideraciones de espacio.

Este plan reduciría a Brichta a su vecindad contigua más Silverbell Terrace, una área predominante minoritaria. Esto además causaría la remoción de los salones portátiles de Brichta los cuales formaron parte de la violación constitucional.

Los estudiantes en las áreas anteriormente designadas como pertenecientes a Brichta se reasignarían a ambas escuelas Tully y Manzo causando así que las tres escuelas aproximaran más los porcentajes étnicos estudiantiles en esa área geográfica del distrito.

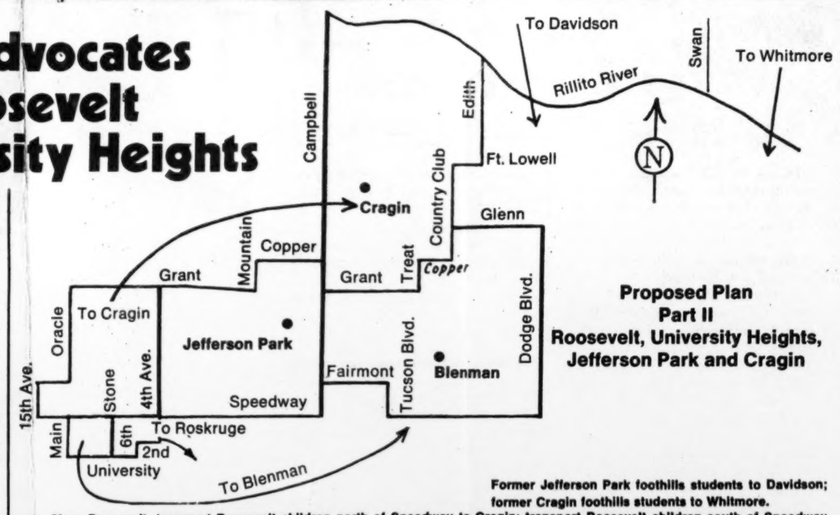
Todos los niños que actualmente caminan a Brichta, Manzo y Tully continuarían a hacerlo. Los niños que cambiarían de escuelas actualmente ya están siendo transportados, de manera que transportación adicional de estudiantes no se requerirá. La distancia recorrida por los niños transportados aumentaría un poco.

Este plan asignaría aproximadamente 84 más niños anglosajones a Tully y 54 más niños anglosajones a Manzo. No sería afectada la continuidad de programas educativos y se requiriría poco adjustamiento en la asignación de personal.

El Consejo Regente Escolar cree que el plan propuesto para estas escuelas conforma con los criterios establecidos por la corte.

	Total Students		Percentage Others		Percentage Minority	
	1977-78	Proposed	1977-78	Proposed	1977-78	Proposed
Elementary						
Blenman	423	500	79.7	74	20.3	26
Brichta	364	175	61	45	39	55
Cragin	537	550	87.3	76	12.7	24
Davidson	370	410	77.6	79	22.4	21
Jefferson Park	218	325	82.6	53	17.4	47
Manzo	472	550	2.3	12	97.7	88
Roskruge	151	175	58.9	57	41.1	43
Tully	376	500	26.6	38	73.4	62
Junior High						
Doolen	611	600	76.6	69	23.4	31
Mansfeld	358	325	48	48	52	52
Maxwell	567	750	47.6	36	52.4	64
Safford	325	350	4.9	5	95.1	95

Proposal advocates closing Roosevelt and University Heights



Proposed Plan
Part II
Roosevelt, University Heights, Jefferson Park and Cragin

Former Jefferson Park foothills students to Davidson; former Cragin foothills students to Whitmore.
Close Roosevelt; transport Roosevelt children north of Speedway to Cragin; transport Roosevelt children south of Speedway and west of Stone to Blenman; assign students east of Stone and south of Speedway to Roskruge.
Close University Heights; reduce Jefferson Park's boundary, assigning children east of Campbell and south of Grant to Blenman; assign all of University Height's attendance area to Jefferson Park; assign Jefferson Park area north of Grant and east of Campbell to Cragin.

In the second school area, affecting Roosevelt, University Heights, Jefferson Park and Cragin, the judge identified Roosevelt and University Heights as vestiges of the former dual system.

The judge said the Black neighborhood which developed around Dunbar between 1912 and 1951 was a neighborhood created by state-mandated segregation. The Black population which surrounded Dunbar spread from the immediate vicinity of Dunbar into the Roosevelt and University Heights attendance areas. The Black residential patterns in these two areas maintain a connection with Dunbar, making them vestiges which must be erased.

Jefferson Park and Cragin were included by the court because of the assignment and transportation to those schools of children living north of the Rillíto River. These children attended Davidson and Whitmore schools, but when these two schools became overcrowded, the foothills students were assigned to the nearest schools then possessing available space—Jefferson Park and Cragin.

However, when Jefferson Park and Cragin became overcrowed, the children north of the Rillito were not assigned to University Heights, the next nearest school with available space. Nor were they reassigned to Davidson and Whitmore when space later became available there. The judge ruled that the present effects of this discriminatory behavior must be cured.

The portion of the plan offered by the district for Roosevelt and University Heights attempts to eliminate the vestiges of Dunbar within the framework of the neighborhood school policy. Both Roosevelt and University Heights would be closed. The Roosevelt neighborhood has suffered in recent years from the encroachment of industry and Pima Community College, with the resulting fragmentation of the neighborhood area. The dispersal of the Roosevelt children among three schools (Roskruge, Blenman and Cragin), all predominantly Anglo in enrollment, would destroy any continuation of the Roosevelt vestige.

The University Heights residential area is still a viable neighborhood, even though it has few school age children. The closure of University Heights, along with merging of its student body with that of Jefferson Park would create a new, integrated neighborhood, generating a school population which utilizes Jefferson Park to its maximum.

Thus, in Jefferson Park, the ethnic ratio would reflect the residential population in the area roughly bounded by Fourth Avenue, Campbell, Grant and Speedway.

In order to accommodate this integrated neighborhood, children formerly attending Jefferson Park and residing east of Campbell and north of Grant would be assigned to Cragin, and children living south of Grant and east of Campbell would be assigned to Blenman. In addition to considerations of classroom space, the assignments would permit these children to attend school without crossing either Grant or Campbell. This plan eliminates the vestiges of Dunbar, with respect to both Roosevelt and University Heights.

The judge did not identify any constitutional violation regarding the Jefferson Park and Cragin neighborhoods, so reassignment of the foothills children north of the Rillito (the former Jefferson Park children to Davidson and the former Cragin children to Whitmore) cannot adversely affect either Cragin or Jefferson Park.

Thus, this aspect of the plan adheres to the policy of conveniently located neighborhood schools as well as returning the pattern of student assignment to what it would have been without the discriminatory actions. The school board feels this plan satisfies the court's order in restoring previous conditions as well as eliminating the Dunbar vestiges.

La propuesta favorece la clausura de Roosevelt y University Heights

En la segunda área escolar que abarca las escuelas Roosevelt, University Heights, Jefferson Park y Cragin, el juez identificó a Roosevelt y University Heights como vestigios del sistema dual anterior.

El juez dijo que la vecindad negra que se había desarrollado alrededor de Dunbar entre 1912 y 1951 fue una vecindad creada por orden del estado. La población negra que circundaba Dunbar se extendió de la vecindad contingua de Dunbar a las áreas de asistencia de Roosevelt y University Heights. Los estilos residenciales negros en estas dos áreas mantienen una conexión con Dunbar haciéndolos vestigios que deben borrarse.

Jefferson Park y Cragin fueron incluidos por la corte debido a la asignación y transportación a esas escuelas de niños que residen al norte del río Rillito. Estos niños asistieron a Davidson y Whitmore pero al atestarse estas escuelas se asignaron a las escuelas más cercanas que tenían cupo para ellos, es decir, Jefferson Park y Cragin.

Sin embargo, cuando Jefferson Park y Cragin se atestaron, los niños del norte del Rillito no fueron asignados a University Heights, entonces la escuela más cercana con cupo. Tampoco fueron reasignados a Davidson y Whitmore cuando hubo cupo después allí. El juez dictó que los efectos actuales del comportamiento discriminatorio deberían ser remediados.

La porción del plan ofrecido por el distrito con respecto a Roosevelt y University Heights trata de eliminar los vestigios de Dunbar dentro del marco del plan de acción de escuelas de vecindad. Ambas Roosevelt y University Heights serían clausuradas, así eliminándose los vestigios de Dunbar. La vecindad de Roosevelt en recientes años ha sufrido de la aproximación de industria y del Colegio Comunitario Pima resultando en una fragmentación de la área vecina. La dispersación de los alumnos de Roosevelt entre tres escuelas (Roskruge, Blenman y Cragin), todas de matriculación anglosajona predominante, destruiría la continuación del vestigio de Roosevelt.

La área residencial de University Heights todavía es una vecindad viable aunque tiene matriculación baja. La clausura de University Heights y la integración de su cuerpo estudiantil con el de Jefferson Park resultaría en una vecindad nueva e integrada así generando una población escolar que utilizaría a Jefferson Park a un grado máximo.

Por consiguiente, la razón étnica en Jefferson Park reflejaría la población residencial en la área confinada por la Avenida 4, Campbell, Grant y Speedway.

Para servir a esta vecindad integrada, los niños que anteriormente asistían a Jefferson Park y con residencia al este de la Campbell y al norte de la Grant serían asignados a Cragin y los niños con residencia al sur de la Grant y al este de la Campbell serían asignados a Blenman. En adición a las consideraciones de espacio de salones, las asignaciones permitirían que los niños asistieran a la escuela sin tener que cruzar ni la Grant ni la Campbell. Este plan elimina los vestigios de Dunbar con respecto a ambas Roosevelt y University Heights.

El juez no citó ninguna violación constitucional con respecto a las vecindades de Jefferson Park y Cragin y, por consiguiente, la reasignación de los niños de las montañas al norte del Rillito (anteriormente niños de Jefferson Park que serían asignados a Davidson y anteriormente niños de Cragin que serían asignados a Whitmore) no puede afectar adversamente a Cragin o Jefferson Park.

De manera que este aspecto del plan concuerda con el plan de acción de localizar escuelas de la vecindad convenientemente y resulta en un regreso al sistema de asignación de estudiantes que hubiera existido sin los actos discriminatorios. El Consejo Regente sostiene que este plan cumple con la orden de la corte al restaurar las condiciones previas y al eliminar los vestigios de Dunbar.

Proposed attendance zones

Tully

Area bounded by Speedway, Grant, Silverbell and the Santa Cruz River.

Area bounded by line even with Goret Road west from the Santa Cruz River to Silverbell, south on Silverbell to Grant (Ironwood Hills), west on Grant to Camino de Oeste, and west on Trail's End Road.

Manzo

Area bounded by Speedway, St. Mary's (Anklam), Silverbell and the Santa Cruz River.

Bounded by Greasewood, Speedway, the district's boundary, Trail's End, Camino de Oeste, and Ironwood Hills (Grant Road).

Brichta

Area bounded by line with Goret Road east to Santa Cruz River, south to Grant, west to Silverbell, south to Speedway, west on Speedway to Greasewood, north to Grant (Ironwood Hills), east to Silverbell, north to Goret Road.

Jefferson Park

Area bounded by Speedway, Campbell, Copper, Mountain, Grant and Fourth Avenue.

Cragin

Area bounded by Grant, Treat, Copper, Country Club, Fort Lowell, Edith, the Rillito River, and Campbell Avenue.

Area bounded by Fourth Avenue, Grant, Oracle Road, 15th Avenue, and Speedway.

Blenman

Area bounded by Dodge Blvd., Glenn, Country Club, Copper, Treat, Grant, Campbell Avenue, Fairmount, Tucson Blvd., and Speedway.

Area bounded by Speedway, Stone, University, and Main.

Roskruge

Area bounded by Speedway, Cherry, Broadway, Southern Pacific Railroad Tracks, and Stone.

Davidson

Area bounded by Flower, Columbus, Rillito River, Swan, the district boundary, Rillito River, Edith, Fort Lowell, Country Club, Glenn, and Dodge.

Whitmore

Area bounded by Grant, Rillito River/Pantano Wash, Rillito River/Tanque Verde Wash, Wilmot (extended), the district boundary, Swan, Rillito River, and Columbus.

Mansfeld

Area bounded by Speedway, Alvernon, 22nd Street, Palo Verde, Layton, Southern Pacific Railroad Tracks and Stone.

Safford

Area bounded by Speedway, Stone, Southern Pacific Railroad Tracks, Silverlake, 6th Avenue, 33rd Street, Freeway (I-10), 22nd Street, and the Santa Cruz River.

Doolen

Area bounded by Craycroft, Rillito River, Columbus, Grant, Swan, Speedway, Santa Cruz River, Grant, Mountain, Copper, and Campbell Avenue.

Maxwell

Area west of the Santa Cruz River which is bounded by the Tucson-Ajo Highway, Mission Road, San Juan, San Jacinto, 22nd Street, and the Santa Cruz River.

Close Spring, former Spring and Safford students north of Speedway and east of Santa Cruz to Doolen; former Spring students south of Speedway and east of Santa Cruz to Safford; former Spring students west of Santa Cruz to Maxwell.
Safford remains open and is designated a magnet and reserve junior high school; Mansfeld and Safford remain open pending construction of new junior high school at an undetermined site; Mansfeld boundaries extended west to Stone and north to Speedway to include part of former Safford area.

District recommends closing Spring

With respect to the two junior high schools identified by the judge, Spring and Safford, it was determined that Spring was a vestige of Dunbar with a continuing stigma as a school not attended by Anglos. The judge ordered all vestiges of Dunbar to be eliminated from the school system.

There were two apparent reasons for the identification of Safford as a school requiring remediation. First, after the closing of Roskruge Junior High in 1972, some Roosevelt graduates were transported to Safford for junior high school. Since Roosevelt was a vestige of Dunbar, these students presumably should have been assigned to a school other than Safford, which already had a substantial Black enrollment.

Secondly, in 1951, the residential area around Dunbar was partitioned among Spring and Safford junior high schools. The Black student population at Safford has remained relatively constant since 1951. The effect at Safford of the state action which caused the Black residential concentration around Dunbar does not appear to have lessened over the years.

By recommending the closing of Spring, the district would remove the last remaining vestige of Dunbar. The assignment of students north of Speedway and east of the Santa Cruz would remove the Roosevelt students from Safford and assign them to Doolen, which the court has suggested should have been done in 1972. This would improve the ethnic balance at Doolen.

Former Spring students west of the Santa Cruz would go to Maxwell Junior High. The former Spring students south of Speedway, east of the Santa Cruz and west of Stone would go to Safford.

Safford would remain open pending the building of a new junior high school to serve the present Safford and Mansfeld attendance areas. No timetable has been submitted for this action. Meanwhile, Safford Junior High will become a reserve and magnet school, which should stabilize its enrollment.

Parents would be intimately involved in the planning and location of the proposed junior high. This proposed action would require the approval of the court.

In all instances, the plan proposed by the district involves meeting its legal obligations with maximum concern for the educational needs of the children affected. The plans have been submitted in the belief that they meet the constitutional mandates ordered by the court.

The judge will make the final decision on all elements of the plan to be implemented this fall.

El juez y consejo escolar sabrán de los padres

El Consejo Regente del Distrito Escolar Unificado de Tucsón ha auspiciado varios foros públicos con el fin de escuchar sugerencias de cómo cumplir con la orden de la corte de desegregar las nueve escuelas señaladas por la corte.

El Consejo seguirá aceptando sugerencias hasta el 4 de agosto, plazo final que se ha dado para presentar cambios al cambio propuesto.

Por consiguiente, el Consejo ha fijado una sesión de estudio para el lunes, 31 de julio, a las 7:30 p.m., en el salón de sesiones ubicado en el edificio administrativo 1010 al este de la Calle 10. El fin de dicha sesión será de permitir a las personas interesadas en las escuelas afectadas por la orden de la corte que "presentan alternativas, cambios, adiciones o cual sugerencias concretas algunas con respecto al plan las cuales puedan ser transmitidas por el Consejo Regente a la corte."

El Juez William Frey de la Corte Federal por este Distrito ha advertido además que él quiere dar oído a los intereses de los padres de familia del distrito y especialmente a los que son afectados por cualquier plan de desegregación.

Dichos padres podrán, por medio de un portavoz o abogado de su grupo respectivo o individualmente, dirigirse a la corte por escrito. "Cualquier comentario por escrito que sea dirigido a la corte deberá fundarse en razón o ser constructivo en carácter y deberá incluir sugerencias o alternativas que expliquen cómo puedan mejorarse los planes," según la orden más reciente del juez.

Todos los comentarios deben ser firmados y enviados por correo o entregados personalmente a la siguiente dirección:

School Desegregation Plan
Clerk, United States District Court
U.S. Courthouse
55 East Broadway
Tucson, AZ 85701

El Juez Frey ha fijado una audiencia en su corte ubicada en la dirección mencionada para el martes, 8 de agosto, a partir de las 8:30 a.m. Las personas que quieran tomar la palabra en corte sesionada tendrán que incluir solicitud al respecto en sus comentarios presentados por escrito. Todos comentarios por escrito tendrán que ser entregados a no mas tarde que las 5 p.m. el viernes, 4 de agosto.

Los respondientes al caso tendrán que manifestar si tienen hijos que asistan a escuelas del TUSD y señalar las escuelas a las cuales sus hijos asistan. Personas que tomen la palabra en la audiencia deberán estar dispuestas a tomar juramento como testigos y disponerse a ser interrogados por abogados que representen intereses diversos.

El distrito escolar presentará su plan propuesto en la audiencia del 8 de agosto y los demandantes (los que iniciaron la demanda que resultó en la orden de desegregación) presentarán objeciones algunas que tengan al plan, o de igual manera, planes alternativos algunos que tengan que sugerir.

A integrantes del público se les permitirá tomar la palabra exigiéndoseles que se limiten a un máximo de 10 minutos por persona.

El Juez Frey ha dicho que primero escuchará a las personas que sean directamente afectadas por el plan de desegregación y que hayan hecho solicitudes, por escrito, de tomar la palabra y después a otros que hayan enviado comentarios por escrito. Si el tiempo lo permite, se les dará oportunidad de tomar la palabra a aquéllos que no hayan hecho solicitud de tomar la palabra.

El distrito recomienda la clausura de Spring

Aparentemente hay dos motivos que contribuyeron a que Safford se citara como escuela mereciente de remediación. Primero, después de la clausura de la intermedia Roskruge en 1972, algunos graduantes de Roosevelt fueron transportados a la intermedia Safford. Puesto que Roosevelt era vestigio de Dunbar, supuestamente estos estudiantes deberían haber sido asignados a otra escuela y no a Safford la cual ya tenía un número substancioso de matriculación negra.

En segundo lugar, en 1951, la área residencial de Dunbar se dividió entre Spring y Safford. La población estudiantil negra de Safford ha permanecido relativamente constante desde 1951. El efecto en Safford de la acción estatal que causó una concentración residencial negra alrededor de Dunbar no parece haber disminuido en el curso de los años.

Al recomendar la clausura de Spring, el distrito removería el último vestigio existente de Dunbar. La asignación de estudiantes del norte de la Speedway y del este del Santa Cruz removería a los estudiantes de Roosevelt en Safford y los asignaría a Doolen lo que la corte ha sugerido que se debería haber realizado en 1972. Esto contribuiría a mejorar la nivelación étnica en Doolen.

Alumnos anteriores de Spring del oeste del Santa Cruz asistirían a la intermedia Maxwell. Alumnos anteriores de Spring del sur de la Speedway y este del Santa Cruz y oeste de la Stone asistirían a la intermedia Safford.

Safford permanecería abierta hasta que se construyera una intermedia nueva destinada a servirles a las áreas de asistencia de Safford y Mansfeld. No se han fijado plazos con respecto a esta acción. Mientras tanto, la intermedia Safford se convertiría una escuela de reserva y atracción especial, lo que causaría estabilidad de matriculación.

Se espera que los padres de familia se involucrarían intensamente en la planificación y ubicación de la intermedia propuesta. Esta propuesta acción necesitaría ser aprobada por la corte.

De todas maneras, el plan propuesto por el distrito exige con que se cumpla con obligaciones legales y a la vez enfoque máximamente en las necesidades educativas de los niños afectados.

El juez hará la decisión final sobre todos los aspectos del plan que se ejecutará este otoño.

Judge, board to hear from parents

The Tucson Unified School District Board of Education has held several public forums to hear suggestions on how to comply with the court order to desegregate the nine schools identified in the order.

The board will continue to accept suggestions until its Aug. 4 deadline for submitting any changes to its proposed plan.

Accordingly, the board has scheduled a study session for 7:30 p.m. Monday, July 31, in its board room at 1010 E. 10th St., to permit those people involved in the schools affected by the court order "to present alternatives, changes, additions or any concrete suggestions to the plan which could be transmitted by the school board to the court."

U.S. District Court Judge William Frey has indicated that he wants to hear from parents in the district, particularly those directly affected by any desegregation plan.

These parents may, through a spokesman or attorney for their group, or individually, address the court in writing. "Any written comment addressed to the court should be reasoned and/or constructive in nature and should include suggestions or alternatives explaining how the plans may be improved," the judge's most recent order reads.

All comments should be signed and mailed or hand-delivered to:
School Desegregation Plan
Clerk, United States District Court
U.S. Courthouse
55 East Broadway
Tucson, Arizona 85701

Judge Frey has scheduled a hearing in his courtroom at the above address for 8:30 a.m. on Tuesday, Aug. 8. Those wishing to be heard in open court must include a request in their written comments. All written comments and requests must be received no later than 5 p.m. on Friday, Aug. 4.

Those responding must state whether they have children attending TUSD schools and which schools they attend. Those who speak at the hearing should be prepared to be sworn as witnesses and may be cross-examined by the attorneys on either side.

At the Aug. 8 hearing, the school district will present its proposed plan, and the plaintiffs (those who initiated the lawsuit which brought about the desegregation order) will present any objections they may have to the plan, as well as any alternative plans they may suggest.

Members of the public then will be permitted to speak, with a 10-minute time limitation on each speaker.

Judge Frey said he will hear first from those directly affected by the desegregation plan who have submitted written requests to speak, then from others who have submitted requests. If time permits, others who have not submitted written requests then will be permitted to speak.

Esta edición veraniega especial del Noticiero TUSD se está enviando por correo a todas las familias que tengan niños que asistan a escuelas del TUSD de acuerdo con la orden del juez de que se informen los residentes del contenido del plan propuesto.

Quien tenga preguntas acerca del plan o de la orden del juez puede dirigirlas a la oficina del Dr. Lee Starr, Subsuperintendente encargado de Servicios Comunitarios, 791-6121.

Información más detallada sobre el asunto de desegregación será incluida en la primera edición regular del Noticiero TUSD de 1978–79 la cual se publicará a mediados de septiembre.

TUSD News

Board of Education:
Mr. Soleng Tom, President
Dr. Mitchell Vavich, Clerk
Laura T. Almquist (Mrs. John)
Mr. Raul Grijalva
Helen Hafley (Mrs. Walter)

Superintendent of Schools:
Wilbur H. Lewis

Editor: Cheri Cross
Design: Dave Gurzenski
Translation: Modern and Classical Languages Department

1978–79 SCHOOL CALENDAR

Tues., Sept. 5	First day of classes
Fri., Nov. 3	Planning day No classes; End of First quarter
Fri., Nov. 10	Veterans' Day vacation
Thurs., Nov. 23 and Fri., Nov. 24	Thanksgiving vacation
Fri., Dec. 15	Last day of classes
Mon., Dec. 18 through Mon., Jan. 1	Winter vacation
Tues., Jan. 2	First day of classes
Wed., Jan. 24	Planning day No classes; End of Second quarter
Thurs., Feb. 22 Fri., Feb. 23	Rodeo vacation
Fri., March 30	Planning day No classes; End of Third quarter
Wed., April 11	Last day of classes

Viewpoint

Superintendent
Wilbur Lewis

For several years, the possibility of mandatory desegregation has hung over the Tucson Unified School District. Until June 5, no one knew if a desegregation order would be forthcoming, or what form any order would take.

On that date, U.S. District Judge William Frey issued the order involving only nine of the TUSD's 102 schools. In his order, the judge recognizes the popular feeling that every child should have an opportunity to go to a school in his own neighborhood, or to the nearest school with available space.

Understandably, any order that would involve a change in schools for any children would initially incur objections from many of those involved. The TUSD Board of Education held numerous public forums in the individual schools prior to submitting its proposed plan to the judge, and has continued to meet with parents to get more specific suggestions on how Judge Frey's mandate might be met.

The board may revise its proposed plan as late as Aug. 4.

Even if either side appeals the judge's ruling, a plan to correct what Judge Frey sees as Constitutional violations must be put into effect in those nine schools this fall.

In this special issue of the TUSD News, you may learn what the proposed plan is, how it relates to and corrects the judge's findings of Constitutional violations, and how to make known your own objections or suggestions for meeting the judge's mandate.

Por algunos años, la posibilidad de desegregación mandatoria ha existido sobre el Distrito Escolar Unificado de Tucsón. Hasta el 5 de junio, nadie sabía si la orden de desegregación vendría, o que forma tomaría dicha orden.

En esa fecha, el Juez William Frey del Distrito Federal expidió la orden incluyendo nada más 9 de las 102 escuelas del TUSD. En su orden, el juez reconoce el sentimiento popular de que cada niño(a) debe tener la oportunidad de asistir a una escuela en su propio vecindario; o a la escuela más cercana con cupo disponible.

Es de entenderse, que cualquier orden que se trate de un cambio en escuelas para cualquier niño(a) inicialmente contraería objeciones de los que son afectados. El Consejo Regente Escolar TUSD tuvo numerosos foros públicos en las diferentes escuelas antes de presentar el plan propuesto al juez, y ha continuado reuniéndose con los padres para obtener más